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Supreme Court of the United States.

October Term, 1883.

FREDERICK P. DIMPFEL AND JOHN R. CALLAGHAN,
Appellants,

vs.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, AND OTHERS,
Appellees.

No. 135.

On Appeal from U. S. Circuit Court,
For the Southern District of Illinois.

BRIEF FOR APPELLANTS.

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NEWARK, N. J.:
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1883.

WARD & TICHENOR, Law Case Printers, 632 & 634 Broad Street, Newark, N. J.

United States Supreme Court.

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AND OTHERS,
Appellants,
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THE OHIO & MISSISSIPPI RAILWAY CO. AND OTHERS,
Appellees.

No. 135.

On Appeal from the Circuit Court of the U. S. for the Southern Dist. of Illinois.

This is an appeal from the decree of the Circuit Court of the United States for the Southern District of Illinois, by which the complainant's bill of complaint was dismissed on a demurrer.

The original bill in this cause was filed on September 12, 1878, by complainant Dimpfel alone, against The Ohio and Mississippi Railway Company, Daniel Torrance, Sophia J. Torrance his wife, and The Farmers' Loan and Trust Company, trustee, defendants.

On the 28th of October, 1878, (*Record*, p. 15,) an amendment was added to the bill, by which John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger and Henry L. Langhaar, were made defendants, on an allegation that they were holders of some of the bonds mentioned in the bill, and that they were made defendants as representatives of all the holders of said bonds, who are very numerous, and whose names are unknown to the complainant, and on the day last mentioned complainant filed a copy of his bill as amended. (*Record*, p. 15.)

On October 31, 1878, Henry Crawford and Perry H. Smith, Jr., as solicitors, entered an appearance for Daniel Torrance, Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger and Henry L. Langhaar, and a formal appearance was entered for them on the 4th of November, and on November 5th, 1878.

On the 5th of November the same solicitors filed for the above named defendants, and The Farmers' Loan and Trust Company, (for whom no appearance had theretofore been entered,) a general demurrer for want of equity, (*Record*, p. 29,) and on September 3d, 1879, an order was entered sustaining the demurrer. (*Record*, p. 32.)

On June 19, 1880, one John R. Callaghan, a citizen of Pennsylvania, presented a petition alleging that he was the holder and owner of 500 shares of the common stock of the Ohio and Mississippi Railway Company, and praying to be admitted as a party plaintiff therein; and on the same day, June 19, 1880, an "amended bill, A," was filed in behalf of Dimpfel and the said Callaghan, (*Record*, p. 35,) with certain exhibits attached; and also on the same day, (June 19, 1880,) an "amended bill, B," was filed, by leave of the Court, containing certain additional and supplemental statements.

On the same day the defendant, The Ohio and Mississippi Railway Company, presented a petition to the Court for leave to file an answer, (*Record*, p. 33,) and on that day filed an answer to the bill. (*Record*, p. 63.)

And on the same day a decree was made, reciting the applications to amend, and for the company to answer, and the former demurrer, and the fact that it had been sustained; leave granted for Callaghan to be made a plaintiff, as of 21st December, 1878, and for the defendant, the railway company, to file an answer; and that the demurrer filed to the original bill was renewed; the demurrer was thereby sustained, and plaintiffs electing to abide by the demurrer, and declining further to amend the bill, the said bill, as amended, was dismissed, with costs, (*Record*, p. 70,) but without any opinion delivered

by the Court, as to the reasons for its decree. From that decree this appeal is taken.

The material allegations of the bill of complainants, as finally amended and dismissed, are as follows:

First. That on the 12th February, 1851, the General Assembly of the State of Illinois passed "An act to incorporate the Ohio and Mississippi Railroad Company," by the second section of which, said company was empowered to construct a railroad *commencing at Illinoistown, on the Mississippi River, in St. Clair county, and running thence on the most eligible route to the east line of the State of Illinois, in the direction of the city of Vincennes in the State of Indiana.*

By the nineteenth section of the act, it was especially provided that the railroad constructed under the act *should be confined within ten miles on either side of the great western mail route from St. Louis to Vincennes.*

By the sixteenth section of the act, the company was authorized *to borrow such sum or sums of money as might be necessary for completing or finishing or operating* THEIR SAID RAILROAD, and to issue and dispose of the bonds for any amount *so borrowed*, and to mortgage their corporate property and franchises, or convey the same by deed of trust, *to secure the payment of any debt contracted by said company*, FOR THE PURPOSES AFORESAID.

That on June 22d, 1852, the General Assembly of Illinois passed an act amendatory of the foregoing, authorizing the company to borrow money and issue its bonds therefor, and secure the same by mortgage trust deed, and sell and dispose of the same at such times and places, and at such rate and prices, as would best advance the interest of said company.

That on the 11th February, 1853, an act was passed authorizing the company to elect a vice-president, who, in the absence or disability of the president, was to have the powers and duties appertaining to the office of president, and such other powers as might be assigned to him by the by-laws, or by resolution of the directors.

By a further act passed 27th February, 1854, the company was authorized to extend its railroad by one or more tracks from Illinoistown to the Mississippi river.

That on February 23d, 1853, the legislature of Missouri authorized the company to purchase and hold all such lands and real estate in the city of St. Louis as might be necessary to enable the company to carry on its business in that city.

Second. That on the first of July, 1852, the company executed its mortgage trust deed to secure an issue of bonds dated on that day, to be known as first mortgage bonds, to amount in the aggregate to $850,000, payable July 1st, 1872, with interest at seven per cent. per annum, payable semi-annually, and said bonds were issued and disposed of for value.

That on January 1st, 1854, the company issued another trust deed, to secure $1,500,000 of second mortgage bonds, payable in twenty years, which bonds were all issued and disposed of for value.

Third. That the railroad company having defaulted on its second mortgage interest, the trustees therein named foreclosed, and a decree was entered at the March adjourned term, 1862, of the United States Circuit Court for the Southern district of Illinois, for a sale of the mortgaged property to take place on the second of June, 1862, which sale was to be subject to the principal of both the first and second mortgage bonds and to certain debts recited in the decree.

Fourth. That on February 5th, 1861, the legislature of Illinois passed "An act to incorporate the Ohio and Mississippi Rail*way* Company, and for other purposes," in and by which a company was organized for the purpose of purchasing and taking a conveyance of all the property and franchises, &c., of the Ohio and Mississippi Rail*road* Company, and that it should possess all the powers and privileges so as aforesaid conferred by law on the Ohio and Mississippi Railroad Company.

By the third section of this act the corporation was declared to possess the power of assuming any debts or liabilities of the former corporation, and of issuing bonds secured by mortgage or otherwise, to secure the payment of them.

Fifth. On June 2d, 1862, a sale was had of the Ohio and Mississippi Railroad Company's property, and the new corporation purchased. In June term, 1862, the sale was confirmed and commissioners were ordered to deliver deeds, and the old corporation to deliver possession, whereby the new corporation, The Ohio and Mississippi Rail*way* Company, became the owner of the rights and franchises of the former corporation.

Sixth. The directors of the new company held a special meeting at St. Louis, November 21st, 1867, at which a proposition was presented to consolidate the property and stock of such company with the property and stock of the Ohio and Mississippi Railway Company, a consolidated corporation existing under the laws of Indiana and Ohio, and a resolution was then adopted, agreeing to the terms of a writing, entitled "Articles of consolidation agreed upon and adopted by and between The Ohio and Mississippi Railway Company of Illinois, and The Ohio and Mississippi Railway Company of Indiana and Ohio;" and since about December 18th, 1867, the Ohio and Mississippi Railway Company, the defendant, has been and now is a consolidated corporation, existing within the States of Ohio, Indiana and Illinois, owning, operating and enjoying lines of railway within said States, and enjoying certain franchises, rights, privileges and immunities within said States.

Seventh. That on 24th December, 1867, the consolidated company, defendant herein, did execute to Allan Campbell and Samuel U. F. Odell, as trustees, a mortgage to secure an issue of bonds known as "consolidated mortgage bonds," and did thereby convey to the trustees all the railroad from Cincinnati, by way of Vincennes, to East St. Louis, being the said consolida-

tion. The bonds not to exceed $6,000,000, with liberty to increase whenever the company saw fit to extend to Louisville, such increase not to exceed $900,000, and $4,000,000 was to be used solely to take up the then outstanding bonds of the consolidated company.

The total of $6,000,000 were issued under this mortgage for a valuable consideration, and are now outstanding, (except some held in trust to exchange for the former bonds), and there also were issued $800,000 on the Louisville extension, which have been sold for value, and are now outstanding.

That on 25th of March, 1871, the Ohio and Mississippi Railway Company (the defendant) issued another mortgage to the same trustees to secure $4,000,000, known as the consolidated mortgage and sinking fund bonds, and did thereby mortgage all its property and franchises previously mortgaged to the same trustees, and that all of said bonds are outstanding, except a part which have been purchased by the sinking fund.

That said mortgages were duly recorded.

That Odell, trustee, is dead, and no successor has been appointed, and Campbell is sole surviving trustee.

Eighth. That on March 30, 1869, the legislature of Illinois passed "An act to authorize the Ohio and Mississippi Railway Company to build a branch to connect their road with a bridge or ferry to East St. Louis," and granting to said company, in respect to said branch, all the privileges, powers, rights and franchises as were then had and enjoyed in regard to their then present railway.

Ninth. That on 21st January, 1870, the Springfield and Illinois Southeastern Railway Company was a corporation existing within the State of Illinois, by consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield and Northwestern Railroad Company, and as such consolidated corporation having the right to operate and enjoy a line of railway from Shawneetown, on the Ohio river, to Beardstown, or

such other point on the Illinois river as the company might select, with the right to extend to some point on the Mississippi river between Quincy and Rock Island.

That on the day last mentioned this company executed a mortgage to the Farmers' Loan and Trust Company (one of the defendants) to secure first mortgage bonds for $3,400,000, and thereby conveyed to said mortgagee all its railroad from Shawneetown to Beardstown, or some other eligible point on the Illinois river, as might be finally determined, whether made or to be made.

That parties variously known as Dodge, Lord & Co., William P. Cutler, or Cutler, Dodge & Co., became entitled to, and the owners of, the whole issue of the $3,400,000 bonds under the last said mortgage, and that subsequently, by transfer and delivery, the whole amount, or greater portion thereof, became the property of John Bloodgood & Co., a partnership doing business as bankers in New York city, composed of John Bloodgood and M. Hildreth Bloodgood.

Tenth. On January 14, 1874, the Farmers' Loan and Trust Company filed its bill to foreclose the last said mortgage, alleging the failure of the company to pay interest on its bonds, and its insolency and inability to earn interest, and asking for receivers to manage the property and receive the income thereof.

On July 3, 1874, a final decree was had in the cause, adjudging that the company was in default, that the mortgaged property was wholly inadequate to respond to the debt charged against it, and that its income was wholly consumed by its operating expenses, and decreed that the property be sold as an entirety by a Master in Chancery at public vendue, and on the 15th September, 1874, the Master did sell the same to M. Hildreth Bloodgood for $500,000, to be paid partly in cash and partly in bonds secured by the mortgage, and the Master received from Bloodgood $40,000 in money and

about $3,000,000 in bonds and overdue coupons, secured by the said trust deed. On the 18th of January, 1875, the sale was approved and a deed delivered to Bloodgood. The railway company was required to unite in the deed, and it did by its vice-president.

Eleventh. On the 28th of January, 1875, Bloodgood sold all the property so purchased by him to Frederick Schuchardt and John Bloodgood, for $500,000.

Twelfth. By deed dated 29th January, 1875, Schuchardt and wife and John Bloodgood and wife conveyed the same property to Daniel Torrance, for the consideration of $1,750,000.

Thirteenth. By deed dated 30th January, 1875, Daniel Torrance and Sophia his wife, purported to sell the same property to the Ohio and Mississippi Railway Company, for $1,750,000.

Fourteenth. On the same day the last named company executed a mortgage trust deed to the Farmers' Loan and Trust Company, to secure bonds proposed to be issued by defendant company for $3,000,000. In the mortgage it was recited *that defendant was the owner of the railroad theretofore belonging to the Springfield and Illinois Southeastern Railway Company, and was desirous of borrowing money to improve the said line of railroad and increase the equipment thereof.*

By the said mortgage it granted to the Farmers' Loan and Trust Company, as trustee, all the property, rights, &c., so conveyed to said company by Torrance by deed dated the same day, and formerly belonging to the Springfield and Illinois Southeastern Railway Company, as aforesaid.

That Daniel Torrance and wife were named in the said mortgage as parties of the third part, and it is recited therein that they became such parties in assurance and confirmation of the same. Neither assumed any liability for the bonds secured thereby.

The mortgage was executed by the Ohio and Mississippi Railway Company by Daniel Torrance, its president, attested by W. M. Walton, its secretary, and by the Farmers' Loan and Trust Company by R. G. Rolston, its president, attested by George P. Fitch, its secretary, and by Daniel Torrance and Sophia his wife.

That the legislature of Illinois, May 7, 1873, passed an act by which it was enacted that the concurrence of two-thirds of the stockholders of any railroad company should be necessary to the validity of any mortgage executed by such company, and that the notice of such meeting should be given sixty days prior to the date on which the same should be held, and that the resolution authorizing the bonds and the execution of the mortgage should be recorded in the different counties in which the road should be situated.

That none of the proceedings which by said statute it was especially provided should be had prior to the execution of bonds and of the last aforesaid mortgage, were had or purported to be had prior to the execution of the mortgage and the issue of the bonds to the Farmers' Loan and Trust Company.

Fifteenth. The recital in the deed of conveyance, dated January 30, 1875, (Torrance to the company), that the consideration of such transfer was $1,750,000 lawful money of the United States, is incorrect, and that the facts are that certain of said bonds, authorized to be issued by said mortgage trust deed, have been made and executed by the defendant company to the amount of $2,000,000, and paid over to Daniel Torrance, or as directed by him, in payment for the property described in said deeds.

Sixteenth. That the railroad known as the Springfield and Illinois Southeastern Railway was operated by a receiver appointed by the Court at the suit of the Farmers' Loan and Trust Company, for about thirteen months, and during that period the excess of the receiver's disbursements over his receipts was about

$75,000, not including taxes for 1874, amounting to $20,000, nor $10,000 paid the receiver.

These facts were fully known to Frederick Schuchardt and Daniel Torrance at the time of the dates of the several deeds aforesaid, and on the 28th, 29th and 30th of January, 1875, that Torrance and Schuchardt were directors of the defendant corporation and members of the executive and finance committees, and Torrance was chairman of said committee and president of the company.

That Schuchardt was largely interested in the bonds of the Springfield and Southeastern Railway Company, and at the same time that he was one of the directors of the defendant company, and a member of the executive and finance committees.

Complainants annex to the bill copies of two circulars dated August 28th, 1874, and March 3d, 1875, signed by Schuchardt and Bloodgood, and marked Exhibits A and B, respectively, and pray that they be taken as part of the bill.

Seventeenth. That Bloodgood & Co. are the largest owners of the bonds in dispute, and are holders and owners of a majority of the $2,000,000 aforesaid, issued in payment for said property, and have been since January 30th, 1875.

That John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger and Henry L. Langhaar have informed complainants that they are owners of certain of said bonds, dated January 30th, 1875, and at their request complainants have made them parties as such owners, and as representatives of all the holders of said bonds.

Complainants annex a copy of the mortgage, the form of bonds and of the coupons, marked Exhibits C, D, and E, and pray that they be taken as part of the bill.

Eighteenth. On the 17th day of November, 1876, William King, and also John W. Garrett, Robert Garrett and J. Harrison Garrett, as partners under the firm name of Robert Garrett & Sons, and James G. Ross,

filed their bill of complaint in the United States Circuit Court, for the district of Indiana, against the Ohio and Mississppi Railway Company and others, alleging among other things, the existence of the three several trust deeds, theretofore executed to Campbell and Odell as trustees, and the mortgage trust deed to the Farmers' Loan and Trust Company, and the issue of the bonds in the bill previously referred to, and alleging defaults in the payment of interest on the second mortgage, and in the payment of moneys into a sinking fund as in the second mortgage provided, and alleging also the ownership of William King of $250,000 of the bonds attempted to be secured by the mortgage executed by the defendant railway company, on the 30th of January, 1875; but said bill did not allege any default in the payment of interest on said bonds held by King, nor any other breach of the conditions of said mortgage.

That William King was an employee of Bloodgood & Co., and the bonds claimed by him were in fact the property of John Bloodgood & Co., and were transferred to King for the purpose of enabling him to establish such proceedings, and M. Hildreth Bloodgood was, at the date of the instituting of the proceedings, a director of the defendant company, and is now.

The bill further alleged the insolvency of the defendant company, its liability to attachments, and the necessity to sell all the railroad covered by the mortgages, and meanwhile the necessity of a receiver to operate the same. The railway company, by Charles A. Beecher, its attorney, who was then and is now a director of the company, immediately appeared to such bill, and admitted its truth. Thereupon such proceedings were had that Daniel Torrance and John King, junior, were appointed receivers of all the property mentioned in said bill as belonging to said defendant company, and afterwards the said John King, Jr., was appointed sole receiver thereof.

That such proceedings were also had in the United States Circuit Court for the Southern District of Ohio,

and for the Eastern District of Missouri and the Southern District of Illinois, and in the Chancery Court of Kentucky, that said John King, Jr., is now sole receiver of all the property owned or claimed to be owned by said defendant company, including the line called the Springfield division, formerly known as the Springfield and Illinois Southeastern Railway, and operates the same under the orders of said Courts aforesaid.

Nineteenth. On March 8, 1878, Allan Campbell, as sole surviving trustee named in the mortgage trust deeds executed by the defendant company, dated 24th of December, 1867, and the 23d of June, 1869, filed his bill of complaint in the United States Circuit Court for the District of Indiana, against the Ohio and Mississippi Railway Company and others, alleging, among other things, a default by the defendant company in the payment of interest due on the bonds secured by the trust deeds so executed to him and Odell as trustees, and praying that he might be put in possession of the property covered by his mortgages as trustee in possession, or that he might be appointed receiver thereof.

That such proceedings were had in said suit that the said John King, Jr., was appointed receiver of all the property covered by the said trust deeds, and said John King, Jr., is now the receiver thereof.

Twentieth. The line of railway purporting to be conveyed to the defendant, the Ohio and Mississippi Railway Company, on January 30, 1875, does not begin at the Mississippi river in the county of St. Clair, nor at any point on said river, and does not run thence on the most eligible route, nor on any other route to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana, but lies in an entirely different direction. And the defendant, the Ohio and Mississippi Railway Company, had no authority or power to become the owner of said line of railroad, nor to execute a mortgage on the same, nor to make and issue the bonds purporting to be secured by the said mortgage.

Twenty first. That on November 1, 1877, and May 1, 1878, interest became due on the bonds in question in this cause, and complainants fear that proceedings may be taken by the trustee under the mortgage to enforce the lien thereof, and unless said deed of conveyance and said mortgage trust deed be declared void, a decree may be entered enforcing the same.

Twenty-second. Complainant Frederick Dimpfel is the holder of one thousand shares of the common stock of the defendant, the Ohio and Mississippi Railway Company, of the par value of $100, equal to $100,000, and Callaghan is the owner of 500 shares of said stock, and that by reason of the premises complainants have received great injury, and the market value of their stock has been greatly depreciated.

Twenty-third. That the board of directors of the defendant company is largely composed of persons who were on the 30th of January, 1875, either directors of said company, or largely interested in the Springfield and Illinois Southeastern Railway.

The prayer is (p. 47,) that the deed of conveyance and the mortgage trust deed and the bonds, all dated on January 30th, 1875, may be decreed to be void and of no binding effect whatever, upon or against the Ohio and Mississippi Railway Company, and for general relief.

On the same day on which the said amended bill was filed, viz., June 19th, 1880, the following additional allegations were filed by way of further amendment.
Record, page 60.

Twenty-fourth. That although the negotiations heretofore set forth between Daniel Torrance and Frederick Schuchardt of the one party, and said Frederick Schuchardt and John Bloodgood as of another party, were had during parts of the years 1874 and 1875, the fact is that complainants were not only not informed in regard to the same at the time they were in progress, and had no notice whatever of any proposed contract by

"unite its railroad with any other railroad," so as to include a purchase of such other railroad *in solido*, we respectfully contend the words will bear no such construction.

This permission, manifestly, only extends to a union of existing railways, by contract between the two regulating the mode of uniting the railways, which cannot, except by a laxity of construction never allowed in favor of corporate powers, be construed to mean such a purchase of another railroad as will extinguish the former corporation and put an end to its corporate existence.

The power to purchase involves much more than merely to make a contract of union. It is in no sense necessary to the exercise of a power to unite that a purchase is made. The latter is not included in its form or essential to its enjoyment, and therefore by well settled rules of construction it is not granted.

The power here granted is not to be confounded with a power to merge or consolidate the two companies or corporations into one. It is simply to unite the *railways*—not by a purchase, or the act would have said so, but by a contract which necessarily implies the continued existence of two separate contracting parties, owners of the railways for the union of which the contract is made.

All doubt as to the meaning of the legislature must be solved against the extended or enlarged construction contended for. "To doubt is to deny."

This Court held, in *Moran* vs. *Commissioners of Miami County*, (2 Black. 722,) "that neither privileges, powers nor authorities can pass, unless they are given *in unambiguous words, and that an act giving special privileges must be construed strictly.*"

Nor can such a purchase be sustained under the other authority invoked for its support.

For instance, it is claimed that by virtue of the consolidation of the Ohio and Mississippi Railway Com-

pany of Illinois, and that of Indiana and Ohio, the power to make this consolidation or purchase vests in the new or consolidated company.

Bearing in mind the well settled rule that no law has any extra territorial force or authority out of the jurisdiction by which it was made, it is manifest that no such power can be derived from the legislation of Indiana or Ohio. If it exists at all, it must be found in the legislation of Illinois.

Nor is it clear, that the only law of Illinois under which this consolidation could have been lawfully effected was under the act of February 28, 1854, by which all companies were "authorized and empowered "to consolidate their property and stock with each other, "and to consolidate with companies out of this State, "whenever their lines connect with the lines of such "companies out of this State."

And a further provision, that the company thus consolidated "shall have all the powers, franchises, and "immunities which the said respective companies shall "have by virtue of their respective charters before such "consolidation possessed, within the State of Illinois."

Here is a clear manifestation of an intention to limit the powers of such new corporation to such as have been conferred by the State of Illinois.

This act was passed in 1854. The original act incorporating The Ohio and Mississippi Railroad of Illinois, was passed in 1851. It is admitted that its purpose was to enable the corporation created by it to be operated in connection with a similar railway in Indiana and Ohio.

The legislature of Illinois might well have conferred upon such corporation the powers possessed by its associates under the laws of Ohio and Indiana, but it carefully avoided such action. It created a corporation of its own, with limited and carefully restricted powers, and when three years afterwards it passes the final consolidation act, by which it limits the powers of such new corporation to which it might exercise under the charter passed in Illinois, it was acting in entire harmony with

its previous policy. The two acts, that of incorporation and consolidation, are *in pari materia*, and must be construed together, and they show a settled policy on the part of Illinois not to import into its boundaries corporations of other States, possessing any powers except such as they might exercise under its own laws. This excludes the idea of comity which is invoked to justify this purchase.

The act of 1861, which incorporated the new company, in anticipation of its purchase of the property and franchises of the old, plainly fails to confer any such additional powers as would include the purchase now under discussion. The power conferred in the last clause of the third section of this new act of incorporation, of making any contract or arrangement with any other person or persons, corporation or corporations, conducive to the objects of its incorporation, or the convenient and effective management of the business of transportation of passengers and freight, and of regulating the charges for such transportation, cannot by any fair rule of interpretation be held to include the power to purchase another railroad. This Court in the case of *Thomas* vs. *Railroad Co.*, (101 U. S., page 71,) held that a very similar clause in the charter of a railroad company did not authorize the company to lease its railroad, much less will it authorize a company to purchase and operate another railroad at an outlay of money or incurring of debt to three times the amount of the original capital of the purchasing company.

The case last cited has an important bearing on several questions involved in the present case.

See also *National Trust Co.* vs. *Miller*, 33 N. J. Equity, 155.

Nor do any other acts of the Illinois legislature on the subject of consolidation apply to the present case. This purchase must stand or fall under the act of February 28th, 1854.

I conclude therefore that the purchase of the Springfield, Illinois and Southeastern Railway by the Ohio

and Mississippi Railway Company, was outside of any power conferred on or enjoyed by the latter company, and is *ultra vires* and void.

II.

The issue of the bonds and the execution of the mortgage in question in this cause were illegal, because in contravention of the statute of Illinois.

The Ohio and Mississippi Railway Company of Illinois had no power under its charter to borrow money and issue bonds and mortgage its property and franchises, for any other purpose than to build the road authorized by its charter.

The sixteenth section of the original charter of the company expressly limits the power to borrow money to "*such sums as may be necessary for completing or finishing or operating their said railroad,*" and the power to mortgage was only "*to secure the payment of any* debt contracted by the said company for the purposes aforesaid."

So also the amendatory act of June 22, 1850, authorizes money to be borrowed "*for the sole purpose of con-*" *structing said road and furnishing the same with cars,* "*locomotives and other machinery necessary to carry on* "*the operations of said company,*" and the authority therefore to mortgage is only "for said purposes."

These provisions are careful to limit the power of borrowing and mortgaging to the purposes for which the company was originally incorporated.

Neither can such authority to borrow and mortgage be found in the act of May 7, 1873, which, although it authorizes every railroad company to borrow money, limits the authority to such as may be necessary for completing, furnishing, improving or operating any such railroad—plainly the railroad of the company borrowing.

This latter act, however, declares expressly that the concurrence of the holders of two-thirds of the amount

of the stock of said corporation, to be expressed as therein provided, shall be necessary to the validity of any such mortgage.

The bill in this case states expressly that no such consent was obtained for this mortgage, and also that the other provisions of the act necessary to the mortgage were entirely disregarded. (*Record*, page 43.)

This statement is of course admitted by the demurrer, and must be fatal to the validity of this debt and the mortgage given to secure it.

III.

There is still another infirmity in these bonds and the mortgage given to secure them, which is fatal to their validity. It appears that they were issued entirely without corporate authority. The transaction was accomplished by Schuchardt and Torrance, without even the knowledge of the directors of the company. (*Record*, p. 61.)

If any authorities were needed in this Court to show the invalidity of such unauthorized transactions, they will be found in the brief of my associate.

IV.

There is still another ground on which these complaining stockholders may impeach and set aside these transactions, and that is that it fully appears that Schuchardt, who was a director of the Ohio and Mississippi Railway Company, and a member of the executive and finance committees, was largely interested in the bonds of the Springfield, Illinois and Southeastern Railway, and also in the management of the latter company; that such company was a hopelesssly losing concern, its earnings not nearly paying its running expenses. It was, therefore, greatly to the advantage of Schuchardt and Blood-

good to *unload* this helpless and worthless enterprise upon another corporation, whose securities issued in exchange for the former would be more desirable. He, therefore, acting with Bloodgood and Torrance, contrived a scheme by which the Ohio and Mississippi Railway Company should bear this new burden. He buys the Springfield Railroad for $500,000, and sells it to his own company, through the intervention of Torrance, its president, for, ostensibly, $1,750,000, but really for nearly $2,000,000, and he and Bloodgood and Torrance, received the proceeds of such sale.

This arrangement was a flagrant violation of that well settled and salutary rule that a man in a fiduciary position cannot deal for his own benefit with the property or interests of his *cestius que trust.*

In all such cases the injured party—in this case the *cestius que trust*, the stockholders—can avoid the transaction.

This Court has frequently dealt with this question, notably so in the comparatively recent case of *Wardell* vs. *Railroad Company*, 103 U. S. 651.

This subject has quite recently undergone an exhaustive examination in the Supreme Court of New Hampshire, in the case of *Pierson* vs. *Concord Railroad Company.* Many of the cases are collected there, and the doctrine was there enforced under circumstances somewhat analogous to those existing in the present case. It is published in 28 Albany Law Journal, page 367. (Current volume, number 19, date Nov. 10.)

No argument can add to the force of that case, and the authorities on which it rests.

It is respectfully submitted that for this cause alone, (if there were nothing in the other objections,) this transaction must be set aside.

The Court in this case cannot be embarrassed in granting the relief prayed for by the consideration that the bonds may have gone into the hands of *bona fide* holders for value without notice; because,

First. The bonds on their face, as well as the mortgage, state that they are given for the purchase of a railroad,

which the defendant corporation was not authorized to buy. That was notice to every purchaser of the illegality of the instruments.

Second. The bill alleges that all the present holders of the bonds are affected with notice, and especially that the two Bloodgoods, Dellinger and Langhaar, who at their own request were made parties defendant to this suit as the *representatives of the other bondholders*, were affected with such notice.

Third. If it should appear in the progress of this cause that there are holders of these bonds entitled to be protected as *bona fide* purchasers without notice, their interests can be presented in the manner adopted in this Court in the case of *James* vs. *Railroad Co.*, 6 Wallace, 752, and *Drury* vs. *Cross*, 7 Wallace, 299.

The question does not arise at this stage of the cause, because it nowhere appears in the bill that any of these bonds have ever been sold. The presumption is that they are held by former owners of the bonds of the Springfield road, who had abundant notice, by the circulars put forth by Schuchardt and Bloodgood, of the true character of the transaction.

Neither can any question of ratification enter into the discussion, for on a demurrer only the facts set forth in the bill can be considered, nor can the demurrant appeal to statements found elsewhere in the answer of another defendant, to invalidate the case made by the bill.

The only allusion to ratification found in the bill is on page 61, where it is averred that if any ratification was ever attempted by either directors or stockholders, their action was without such knowledge of the facts as to make it binding on the company.

Nor is the complainants' case open to the charge that they have lost the right to attack these proceedings either by laches or acquiescence.

It appears by the bill that the facts on which Mr. Dimpfel's original bill was founded, did not come to his knowledge until May, 1878, and that then he promptly

sent a written protest against this illegal action. (*Record*, p. 60.) His original bill was sworn to in August, 1878, and from time to time, as new facts came to his knowledge, and that of Mr. Callaghan, the bill was opened to let in the allegations of such newly discovered facts by way of amendment.

All these statements of the bill are of course admitted by the demurrer, and effectually preclude defendants from invoking either laches or acquiescence to defeat complainants' claim.

This is not a case to which the cases cited relating to the rescission of contracts apply; complainants are not here seeking the aid of a Court of equity to decree the rescission of a contract which they admit to have once existed, and under which parties might have acquired legal and equitable rights. Of course such contracts will not be rescinded unless such legal and equitable rights can be protected and preserved.

Complainants are here for a different purpose, viz., to ask the Court to declare that certain transactions having the form of contracts, are not and never have been contracts. They ask the Court not to terminate the obligation of a contract, but to declare that the pretended contract never possessed any obligatory force; that it was void *ab initio*, and incapable of ratification. It needs no authority to show that a different rule prevails in such a case from that which is applied to the rescission of a contract that once existed by the lawful consent of both parties to it.

Nor is this a case for the application of the doctrine, that only the State of Illinois can impeach these transactions, as being in excess of corporate power. That rule has no application to a case where an individual sustains an injury by reason of such excess.

It is true that when no person sustains an injury by means of a public nuisance except such as is common to all the public, then only the Attorney-General or some other representative of the public can complain, but when an individual is subjected to a special injury to

his person or property by such nuisance, then he can complain for himself.

In this case it appears that these complainants, owning large blocks of the stock of the defendant corporation, find that by these unauthorized and illegal proceedings of their trustees an apparent debt of three millions of dollars has been created against the corporation, a large majority of which is still held by the wrongdoers, so that the value of the shares is greatly impaired, and the corporation burdened with the operation and management of a losing railroad, which will entail a large annual loss on the corporation, thus impairing its ability to earn dividends without the slightest corresponding benefit except to the directors, who have shifted their former burden to the shoulders of complainants' corporation.

Besides, this is not merely a case of want of corporate power; it is a case of fraud in which at least three of the demurring defendants participated, and who still hold a great majority of the fruits of their fraud in the bonds of the defendant corporation.

It is not competent for them to say that so long as the State of Illinois does not complain, the injured stockholders are without redress.

V.

The opinion delivered by Judge DRUMMOND in sustaining the demurrer in this case, is invoked here to prevent a reversal of the decree of the Circuit Court. (9 *Bissell*, 127.)

It is respectfully insisted that this opinion is founded upon manifest errors, both of law and of fact. In point of law it relies on what is called the extreme liberality with which Courts in recent times construe the powers of railroad corporations to accomplish the general scope and objects of their creation, and that Courts have recently relaxed the strictness with which they formerly considered questions of *ultra vires*. (Page 130.)

If it is intended by this to assert that Courts in modern times have in the least relaxed that course or rule of decisions, which limits the powers of corporations to those conferred by their charters, we submit it is an error, not only as to the general course of decisions in the Courts of this country, but notably so in regard to the decisions of this Court.

The cases cited in my associate's brief, show how fully this Court has adhered to the original and salutary doctrine of strict construction. Nowhere has the rule been more forcibly or tersely stated than by Mr. Justice STRONG, delivering the unanimous judgment of this Court in *Huntington* vs. *Savings Bank*, 96 U. S., 393. He says: "The rules to be applied to the construction of corporate grants are well known. A corporation created by statute *can exercise no powers and have no rights, except such as are expressly given, or necessarily implied.*"

See also, *Dodge* vs. *Woolsey*, 18 How., 331.
Thomas vs. *Railroad Co.*, cited *supra*.

So in *Scovill* vs. *Thayer*, 105 U. S., 151; this Court again recognize the rule "that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization."

So we contend also, that Judge DRUMMOND was equally in error in resting his opinion on the supposed facts that the defendant company had received benefits from money raised from the bonds in question, or had derived any benefit whatever from the purchase, and in the supposed fact "that the bonds had been issued and passed into the hands of *bona fide* purchasers, on the faith of the contracts made." (Page 131.)

It nowhere appears that the defendant corporation has derived any benefit from the purchase of the Springfield Railroad, unless a benefit will be inferred from the fact that it paid $3,000,000 for a road that could not earn its running expenses, and which had been purchased by the vendors at public sale for $500,000.

It has also been already shown that it nowhere appears in the bill of complainants that any bonds had been sold or passed out of the hands of those to whom they were originally delivered; and that the bill alleges that all the present holders are affected with notice of their illegality. And such a statement must have disregarded the fact that each bond and the mortgage disclosed on its face the fact which manifested their illegality as not allowed by the charter, of which charter all persons dealing in the securities of the company were bound to take notice. In like manner the Judge overstates by two years the time within which it was possible for complainants to sue.

This unauthorized finding of the Judge may perhaps be accounted for by the fact that his opinion was delivered in 1879, while complainants' final amended bill, the allegations of which greatly strengthen their equity, was not filed until 1880, and that the opinion delivered on the previous bills does not fit the facts set forth in the amended bill.

Besides, it is shown above that the Court may, in granting relief to complainants, preserve the rights and equities of *bona fide* holders of the bonds, if any such shall hereafter appear.

VI.

The doctrine of laches relied on by Judge DRUMMOND, and the cases cited on that point in the brief of the appellee, rest on the idea that new rights have intervened, which render it inequitable to grant complainants their relief. When there has been no material change in the situation the doctrine cannot be invoked.

In the recent case of *Daggers* vs. *VanDyke*, reported in 37 N. J. Eq. (10 Stewart,) page 130, the Court of Chancery of New Jersey held, on the question of laches, as follows:

"The delay of complainant in seeking redress constitutes no defence. It is only when the complainant has slept over his wrong so long that if relief be given to him *great and serious wrong* will be done to the defendant, that laches constitutes a complete defence. Here the parties are in almost the same position that they were at the time the wrong for which redress is sought was done, and relief may be given to the complainant without doing any harm whatever to the defendant." In that case there was a delay of over eight years.

The difficulty with these transactions is too radical to be cured by direct acquiescence, much less by mere non-action. The authorities cited in this case fully show that not even the fullest ratification by the company, with the consent of every stockholder, would suffice to make valid such proceedings.

Yet this Court is asked to decide that in such a case, without the slightest suggestion of positive acquiescence on the part of complainants, and with the facts alleged in the bill and admitted by the demurrer that the company is still managed and controlled by those who have done the wrong, and still retain the fruits of it in their possession, a delay of about two years in applying for relief is such an acquiescence as amounts to a ratification.

THOMAS N. McCARTER,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1883.

Frederic P. Dimpfel and John R. Callaghan,
Appellants,

No. 135. *vs.*

The Ohio and Mississippi Railway Company. The Farmers' Loan and Trust Company, et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Brief for The Farmers' Loan and Trust Company.

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This cause comes here on an appeal from a decree of the Circuit Court of the United States for the Southern District of Illinois, sustaining a demurrer and dismissing the original and amended bills therein filed by appellants.

The original bill in this cause was filed Sept. 12th, 1878, by Frederic P. Dimpfel, in his own behalf, and on behalf of such others as might choose to join with him against the Ohio and Mississippi Railway, Daniel Torrance and others; but since a demurrer to it, filed November 5th, of the same year, was sustained by the Court (Record, p. 32) on September 3rd, 1879, it cuts a small figure in the case, as all its substantial averments are contained in the amended bills.

On June 19th, 1880, John R. Callaghan filed his petition, averring that he was the owner of 500 shares of the common stock of the Ohio and Mississippi Railway Company, and praying to be made a party plaintiff (Record, p. 33).

On the same day, William T. McClintick, on behalf of the Ohio and Mississippi Railway Company, defendant, filed his application for leave to file an answer herein (Record, p. 33).

On the same day, Frederic P. Dimpfel and John R. Callaghan, filed their amended bill "A" (Record, p. 35), setting forth the facts upon which the jurisdiction of the Court depended.

The bill proceeds to set forth, that, by an act of the legislature of Illinois, passed February 12th, 1851, and various acts supplemental thereto, the Ohio and Mississippi Railroad Company was incorporated with power to build and operate a railway from a point on the Mississippi river, in the county of St. Clair, to the east line of the State of Illinois, in the direction of Vincennes, Indiana, and with power to borrow money and secure the same by mortgage, and that it did borrow money and secure the same by two mortgages (Record, p. 36).

The bill further sets out, that, by a decree of the Circuit Court of the United States for the Southern District of Illinois, the second of the before mentioned mortgages was foreclosed, and the property sold, subject to the principal of the first and second of said mortgages, and that the Ohio and Mississippi Railway Company, incorporated by an act of the Illinois legislature, of February 5th, 1861, became the purchaser thereof: that, by said act, the said the Ohio and Mississippi Railway Company had the same powers as the Ohio and Mississippi Railroad Company (Record, p. 37).

That on the 18th of December, 1867, the said Ohio

and Mississippi Railway Company, existing under the laws of Illinois, was consolidated with the Ohio and Mississippi Railway Company, a consolidated corporation under the laws of Indiana and Ohio, and that thenceforth the Ohio and Mississippi Railway Company, the now defendant, was a consolidated corporation under the laws of those three states (Record, p. 38).

The bill proceeds to set out certain mortgages made by the consolidated company to Samuel U. F. Odell and Allen Campbell, as trustees, and the death of Samuel U. F. Odell (Record, p. 40).

The bill further sets out the corporate existence of the Springfield and Illinois South-eastern Railway Company, and the execution and foreclosure of a mortgage on its lines, which mortgage was to the Farmers' Loan and Trust Company, as trustee, and secured bonds to the amount of $3,400,000, and which foreclosure was terminated by a sale of said line, January 18th, 1875, to M. Hildreth Bloodgood, for the expressed consideration of $500,000, which was paid, $40,000 in cash, and the remainder, with about $3,000,000 of the bonds and overdue coupons, secured by said mortgage (Record, p. 42).

That, on January 28th, 1875, M. Hildreth Bloodgood sold and conveyed the said line upon the expressed consideration of $500,000 to Frederic Schuchardt and John Bloodgood.

That, on January 29th, 1875, Frederic Schuchardt and John Bloodgood conveyed said line to Daniel Torrance, upon the expressed consideration of $1.750,000.

That, on January 30th, 1875, Daniel Torrance and Sophia J. Torrance, his wife, conveyed said property, upon like consideration, to the Ohio and Mississippi Railway Company.

That, on the same day last mentioned, the Ohio and

Mississippi Railway Company, by Daniel Torrance, its president, and Daniel Torrance, and Sophia J. Torrance, his wife, executed a mortgage on the said property to secure $3,000,000 of bonds; provided, however, that neither Daniel Torrance nor Sophia J. Torrance assumed any liability for said bonds (Record, p. 43).

That, on May 7th, 1873, the legislature of Illinois passed an act, providing that no mortgage upon any railroad should be valid unless sanctioned by the concurrence of two-thirds of the stockholders thereof, which concurrence must be given at a meeting held for said purpose, of which at least sixty days' notice must be given; and that none of these requirements were complied with as to said mortgage.

That the recital, in the deed from Daniel Torrance, and Sophia J. Torrance, his wife, to the Ohio and Mississippi Railway Company, that the consideration thereof was the sum of $1,750,000 in cash was incorrect, and that the actual consideration was the sum of $2,000,000 of the bonds secured by said mortgage.

That the said line had not theretofore earned its operating expenses, to the knowledge of Frederic Schuchardt and Daniel Torrance, and that they were, at the time of said conveyances, directors of the Ohio and Mississippi Railway Company, and Daniel Torrance was president of said company (Record, p. 34).

That, at the same time, Frederic Schuchardt was largely interested in the bonds of the Springfield and Southeastern Illinois Railway Company, and was acting, in the transactions before set forth, for the holders of said bonds (Record, p. 44, and Exhibits, A and B, p. 48).

That John Bloodgood and others are holders of said bonds, and are made defendants, to represent all the holders of said bonds (Record, p. 44), and a copy of the said mort-

gage, and bonds and coupons is annexed (Record, Exhibits C, D, and E, pp. 50–58, 59).

That, upon bills filed by William King and others, and Allan Campbell, as trusfee, a receiver of all the property of the Ohio and Mississippi Railway was appointed (Record, p. 49).

That the line of the Springfield and Illinois South-eastern Railway Company does not extend from the Mississippi river, in St. Clair county, to the east line of Illinois, but lies in a wholly different direction; and that the Ohio and Mississippi Railway Company had no authority to purchase said line (Record, p. 50).

That the interest on said bonds is in default.

That the plaintiffs are holders of the common stock of said Ohio and Mississippi Railway Company, and, as such, have been damaged by the transactions hereinbefore set forth.

The bill prays, that the said sale of the Springfield and Illinois South-eastern Railway to the Ohio and Mississippi Railway, as well as the said mortgage of the said line to the Farmers' Loan and Trust Company, may be set aside and declared void (Record, p. 47).

The amended bill, "B," likewise filed June 19th, 1880, sets forth the following state of facts:

That the negotiations described in the amended bill, "A," were between Daniel Torrance and Frederic Schuchardt, of one part, and John Bloodgood and Frederic Schuchardt, of the other part, and took place in the years 1874 and 1875, but that the complainants were wholly ignorant of such transactions, or of the purchase of the line of railway therein described, or of the mortgage therein set forth, until the month of October, 1876.

That said Torrance was cognizant of the arrangement, whereby the said Schuchardt and Bloodgood bought the said

persons, corporation or corporations, conducive to the objects of its incorporation, or the convenient and effective management of its business of transportation of passengers and freight, and of regulating its rates of charges for such transportation."

This, it seems, to us, confers express power to make the transaction in question, for this is an arrangement with another person or persons conducive to the convenient and effective management of its business of transportation of passengers and freight. Here, we have express authority from the legislature of Illinois; but, in case the Court should not agree with us on this proposition, we refer to the act of the legislature of Illinois under which this consolidation took place.

An act authorizing consolidations of railroad companies passed by the Illinois legislature (Acts of 1854, p. 9, sec. 2), which provides

"Such consolidation may take place whenever the said companies shall respectively agree upon the terms and conditions of the same; and the said companies, when so consolidated, shall be authorized to agree upon the name or names of such consolidated company, and by such name or names the said consolidated company shall be a body corporate and politic, shall have a common seal or seals, and by such name or names shall be respectively contracted with and make contracts, shall sue and be sued, implead and be impleaded with, and shall have all the powers, franchises, and immunities which the said respective companies shall have by virtue of their respective charters, before such consolidation passed within the State of Illinois."

Under this act it is plain that when, in 1867, the Ohio and Mississippi Railway Company of Illinois was consolidated with the Ohio and Mississippi Railway Company of Indiana and Ohio, the consolidated company possessed all the powers that either of the constituent companies possessed; that such powers might be exercised within any of the States through which the consolidated company ran, so

far at least as the State of Illinois was concerned, and therefore, inasmuch as want of power will never be presumed, the bill is defective in not avering that the consolidated company had not by the laws of Indiana power to purchase this line of road.

Railway Co. v. *McCarthy*, 96 U. S. 267.
Whitney Arms Co. v. *Barlow*, 63 N. Y. 62.
Green's Brice's Ultra Vires, 2d ed., pp. 37–40.

In *Express Co.* v. *Railroad Co.*, 99 U. S. 191, it is expressly said:

"The contract of a corporation is presumed to be *infra vires* until the contrary is made to appear."

But we may go further, for the act of the Indiana legislature, approved March 3rd, 1865, under which the Indiana corporation was organized, confers in section 7 express power to do this very act (Davis' Supplement, Statutes of Indiana, pp. 398–401).

Section seven provides:

"Any railroad company incorporated under the provisions of this act, shall have the power and authority to acquire, by purchase or contract, the road, road bed, real and personal property, rights and franchises, of any other other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part, and may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining states, may assume such of the debts and liabilities of such corporations as may be deemed proper; and upon purchasing any such railroad or railroads, all the real and personal property of such corporations, so purchased, and also the rights, powers and franchises of the same, shall become vested in the railroad company so purchasing the same, together with all the rights, powers, privileges and franchises, conferred by the charter of the roads so purchased; and the company so purchasing or acquiring the title to or use of such railroad or railroads,

shall have power to complete, maintain, and operate the same. Any railroad company incorporated under the provisions of this act, shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this state, upon such terms as may be agreed upon by the corporations owning the same; and shall also have the power and authority to construct, equip, maintain, and operate branch railroads leading from the main line or from the termini of such railroad, from and to such points, within this state or any adjoining state, as may be deemed expedient * * * upon purchasing or constructing any railroad as hereinbefore provided, the corporation purchasing or constructing the same, shall have power and authority to issue new stock to such extent as may be considered advisable, and the same to dispose of as hereinbefore provided, and to issue and sell bonds to such extent as may be deemed expedient, and to secure the same by mortgages and deeds of trust upon all the real and personal property, rights, powers, and franchises of any railroad so purchased, constructed, or in course of construction, as hereinbefore provided."

Here is the conclusive answer to the proposition, that this act was *ultra vires*. The legislature of Illinois has said, as much as though it had done so by special act, that the Ohio and Mississippi Railway Company, as consolidated, shall have all the powers which any of its constituent parts possessed; and the Ohio and Mississippi Railway Company, in Indiana and Ohio, before this consolidation, possessed power to do the very act now drawn in question. Suppose this act had been done by the Indiana company before the consolidation, and the consolidation had then taken place, can there be any doubt that the consolidated company would be bound?

II.

The appellants are not in condition to ask for relief on the ground that this transaction was *ultra vires*. By their own laches they are estopped. In their amended bill, they aver that they became aware of the purchase in question, in

October, 1876, yet they took no steps to have it set aside until September 12th, 1878, when their original bill was filed. It must be remembered, that the bonds issued for the purchase are payable to bearer, and negotiable by delivery, and had been on the market for more than two years prior to complainants' filing their bill. Under such circumstances the appellants must have acted promptly in order to assert and protect their rights. Moreover, in their original bill, appellants did not pray for an injunction against the negotiation of these bonds, nor do they now pray for such relief.

The application of a stockholder to set aside a transaction, as *ultra vires*, must be made promptly, or it will not be entertained. In *Terry* v. *The Eagle Lock Co.*, 47 Conn. 141, the plaintiff was a stockholder in the defendant. While he was such stockholder, the company increased its capital from $100,000 to $150,000, out of its surplus, by vote of a meeting of the stockholders, at which meeting the plaintiff was present, and voted in the negative. This extra stock was used to pay for all of the stock of the Gaylord Company, another manufacturing corporation, which was afterward operated on behalf of the Eagle Lock Co., by eight trustees. After those transactions, the plaintiff bought and sold stock in the Eagle Lock Company on his own behalf, and sold stock on behalf of his father's estate, of which he was administrator. Five years after this transaction he filed a bill to set the same aside. Held that he had no standing in Court to obtain such relief, as the parties could not possibly, by the laches of plaintiff, be placed in *statu quo*.

So complainants here have slept upon their rights, on their own showing, two years, without asking for any relief.

Again, in the case of *Kent* v. *The Quicksilver Mining*

Co., 78 N. Y. 159, it was held that, where the company, after the issue of all its stock, had, at a general meeting of the stockholders, voted to authorize holders of common stock to convert their shares, by the payment of five dollars per share, into preferred stock, and this had been done in 1870, that a holder of common stock, bringing suit to set aside this transaction, after four or more years had elapsed, had no standing in Court, because of his *laches*, though the transaction was clearly *ultra vires*.

In *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62, the Court say:

"It is now very well settled that a corporation can not avail itself of the defense of *ultra vires*, when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action can not be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail."

This case settles clearly, that the Ohio and Mississippi Railroad Company could not set aside this transaction, if it were itself the plaintiff.

In *Sheldon H. B. Company* v. *Eickemeyer H. B. M. Co.*, 90 N. Y. 607, the Court held, that where the trustees of a corporation, in good faith, assigned all the property of the corporation in settlement of a judgment, the property not being worth more than the amount of the judgment, and all the stockholders had knowledge of the transaction at the time, and for four years thereafter took no steps, neither the company nor any stockholder could set the transfer aside. The Court say,

"That it is not needed, in such a case, that there be an express assent on the part of the stockholders, to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, this will be deemed an ac-

quiescence in it; and if innocent third persons have been led thereby to put themselves in a position from which they can not be taken without loss, if the act were held invalid, the stockholders will be estopped from questioning it."

So in the case at bar, whilst we maintain that the purchase in question was *infra vires;* even if it were not, the complainants, on account of their *laches,* are estopped to say that it is *ultra vires.*

In *Chaffee* v. *Rutland Railway Co.*, 28 Albany Law Journal, 275, it was held, that where scrip had been issued to pay dividends on the preferred stock of the company without objection from any of the stockholders or creditors of the company, and where all the scrip of the company thus issued had been converted into bonds, except that held by the plaintiff, that in an action by the plaintiff to compel the conversion of this scrip into bonds the company can not set up that the issue of the scrip was *ultra vires.*

Our contention, therefore, is, that the plaintiffs are estopped to claim that this purchase was *ultra vires,* even if it were.

III.

It does not appear from the bill that the plaintiffs have been damaged, for the mere averment of damage does not amount to sufficient to justify a court of chancery in interfering with its authority. In order to authorize any Court to interfere to restrain or set aside an unlawful act, it must be made to appear that the complainant has been specially affected by it, and in such case he must not merely aver that he has been specially affected by it, but show how such special injury came about. So, in this case, it is not sufficient for the complainants to aver that they were, at the time of filing the bill and

the amended bill respectively, holders of the common stock of the Ohio and Mississippi Railway Company, for they show that they learned of the transaction complained of in 1876; so if, at any time since they learned of this purchase, they have become stockholders, they bought, in contemplation of law at least, with this properly in view, and in respect to stock so purchased they are not injured. In order to make their bill good in this respect, they must aver that at the time they learned of this purchase they were and they have ever since continued to be holders of the common stock of said railway company defendant, and, without such averment, the bill is bad, as it does not show any injury to the complainants from this transaction, and, unless they are injured, they have no claim to any relief at the hands of this Court, or any other, either at law or in equity, for the law will not permit a man to buy property for the purpose of speculating on the chances of a law suit.

IV.

The appellants will doubtless claim, that as Schuchardt was one of the directors of the Ohio and Mississippi Railway Company, defendant, he was disabled from contracting with it or conveying to it on his own account. This might be so, if he were at the same time acting on account of the company: but we know of no rule of law which forbids a director dealing with his company, if he puts himself into a position where he is dealing at arm's length with it. Now, the amended bills (Record, p. 60, A and B) show that Daniel Torrance, the president of the company, was acting on behalf of it, and was aware of all that was happening between Schuchardt and Bloodgood and the bond holders of the Springfield and Southeastern Illinois Railway Company, and even if, as charged

in the amended bill B (Record, p. 60), Torrance was acting in collusion with Schuchardt and Bloodgood, it is only the common case of an agent of a company acting within his apparent authority to the prejudice of the company. So, if this act were performed by Torrance in good faith and honestly, the company would be bound, even if he exceeded his actual authority, because it has, by making him president, placed it within his power to deceive the holders of these bonds who are represented by the Farmers' Loan and Trust Company. These bonds, executed in the usual form by the president and secretary of the company, and issued on its behalf, and of which it has received and still holds the proceeds, it can not now repudiate on account of any such fraud in their inception, when the bill sets forth that the board of directors after the consummation of this agreement learned of this transaction, and yet took no steps to repudiate it until the filing of their answer in June, 1880, five years after the transaction complained of, and after taking the benefit of it for that length of time. Moreover, there is no charge that the secretary who attested these bonds was a party to any fraud or excess of authority.

Following the reasoning in *Rolling Stock Co.* v. *Railroad*, 34 O. S. 450, it is clear, that the mere fact that Schuchardt was a director of the Ohio and Mississippi Railway Company would not make this purchase voidable at the election of the company. The Court in that case say:

"These citations sufficiently show that in England a contract between a corporation and one of its directors would, in the absence of a statute affecting its validity, be upheld and enforced in her common law tribunals. That the same rule prevails in this country is well established."

It is also held in this case that the company, when the

contract is voidable at its option, must act promptly in repudiating the contract, and will not be permitted to sleep upon its rights. The Court say:

> "Hence, where the principal has an option to avoid or stand by the contract of his agent, he is not permitted to await the issue of events to transpire in the future with the purpose of adopting the contract if the transaction proves a paying one, and if not to reject it."

Can any language be more apt to describe what the Ohio and Mississippi Railway will have done, if they are allowed to repudiate this purchase or to have it repudiated for them?

In the case at bar, the complainants show in their bills that Torrance, acting on behalf the company, received no personal benefit from the transaction, and that all the facts were communicated by Schuchardt to Torrance, and it is certain that the price paid was not excessive for two hundred and twenty-two miles of what it was hoped would prove a valuable feeder to the main line of the Ohio and Mississippi Railroad.

The question, however, is not whether Torrance and Schuchardt may not in some way be accountable to the company, but whether the Farmers' Loan and Trust Company, and its *cestuis que trustent* the holders of these bonds, are to be held responsible for a fraud, if it be one, to which they were not parties, and when Torrance, in executing this mortgage and these bonds, was acting within the scope of his apparent authority? It is the common case of an agent having, under certain circumstances, authority to execute negotiable paper, which circumstances are peculiarly within his knowledge when he does execute it, for the purchase of property which his principal keeps without objection for five years, whether it is not too late for the principal to object to the invalidity of the agent's act or the want of power of the agent?

The cases heretofore cited, as well as the case of *Olcott* v. *Tioga Railroad Co.*, 27 N. Y. 546, show conclusively that, in the case at bar, there has been a ratification in law. In the case just cited, the president of the railroad company bought locomotives and drew bills for the price of them, and for three years was suffered to operate the road with them. Then the directors took possession of the line and of this property. It was held that this amounted to a ratification.

In *Sherman* v. *Fitch*, 98 Mass. 59, the president of a company gave a chattel mortgage on its property without the assent of the directors of the company, but no objection was made to its validity until the company became insolvent. It was held that the company had so far acquiesced in it as to be bound.

In *Kent* v. *Quicksilver Mining Co.*, *supra*, the issue of the preferred stock was in fraud of the other stockholders, and yet their acquiescence for five years was held to disable them from setting it up.

The Court say:

"However that may be, an unconscionable arrangement will not be disturbed where there has been ratification of it with knowledge of all its bearings, after time has been had for consideration."

In *Chaffee* v. *Railroad Co.*, *supra*, the act of the railroad company, in issuing the script then in question, was fraudulent as against the creditors and the holders of common stock; yet, there it was held that, as they had failed to make objection in time, they were estopped.

So, here we say, that as the present appellants have failed to object to this transaction when they first learned of it, but waited two years before filing their bill, they are presumed to have acquiesced. The law did not permit them to wait to see whether the transaction now com-

plained of was favorable or unfavorable, but it required them to act with promptness, particularly where negotiable bonds had been issued on the faith of the transaction.

We desire, particularly, to call attention to the decision of Judge Drummond, and the reasons given by him in supporting the demurrers to appellants' amended bills. They seem to us unanswerable. *Dimpfel v. O. & M. Railway Co.*, 9 Bissell, 127.

Representing, as we do, the trustee of negotiable bonds, now scattered far and wide, in the hands of innocent parties who have paid full value for them, we can not too strongly urge that they are entitled to every presumption in favor of their validity, as against those by whose laches they have been permitted to be put in circulation, to the extent of over two millions of dollars, even though it be conceded, which we do not, that the original issue was *ultra vires*.

We respectfully submit that the decree appealed from should be affirmed.

HOADLY, JOHNSON & COLSTON,
HARRISON, HINES & MILLER,
Counsel for Farmers' Loan and Trust Company.

CINCINNATI, *November 2nd*, 1883.

110-209

IN THE

SUPREME COURT

OF THE UNITED STATES.

FREDERICK P. DIMPFEL,
JOHN R. CALLAHAN,
Appellants.

vs.

THE OHIO AND MISSISSIPPI
RAILWAY COMPANY, *et al.*
Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

ABSTRACT AND ARGUMENT FOR FARMERS' LOAN AND TRUST COMPANY, APPELLEE.

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ABSTRACT.

On the 12th day of September, 1878, one of the appellants (Dimpfel) filed his bill in the court below, in his own behalf, and in behalf of such others in like interest as might come in, against the Ohio and Mississippi Railway Company, Daniel Torrance, Sophia J. Torrance and the Farmers' Loan and Trust Company.

Afterward, by an amendment to the bill, John Bloodgood, M. Hildreth Bloodgood, Charles Dillinger and Henry L. Langhaar, were brought in as defendants. An amended bill marked "A" in the record (p. 35), and certain amendments thereto, marked "B" (p. 60), were afterward filed, and to the bill, as it thus stood, a demurrer was sustained and the bill dismissed. The demurrer as filed was on behalf of the Trust Company, the Bloodgoods, Dillinger and Langhaar (p. 29).

AMENDED BILL.

The bill alleges in detail the incorporation of the Ohio and Mississippi Railroad Company in the State of Illinois, under a law of that State, passed February 12, 1851, with power to construct a railroad from Illinoistown on the Mississippi river to Vincennes, in the State of Indiana.

The making of certain loans upon deeds of trust is then alleged, upon which a default occurred, resulting in a decree of foreclosure in March, 1862, and the sale of the road June 2, 1862, to the Ohio and Mississippi Railway Company, a corporation especially created for the purpose of buying in the property. It is then alleged that the last named company was, December, 1867, consolidated with the Ohio and Mississippi Railway Company, of Ohio and Indiana, and that the defendant company has since been a consolidated corporation under the laws of Ohio, Indiana and Illinois. The execution of two mortgages upon the consolidated road is alleged, but no question arises here upon either.

It is then alleged that January 21, 1870, the Springfield and Illinois South-Eastern Railway Company was

a corporation of Illinois, with the franchise to build and operate a railroad from Shawneetown to Beardstown. That on said day, said company executed a mortgage to the Farmers' Loan and Trust Company to secure $3,400,000 of bonds; that, a default having occurred on this mortgage, the Trustee, January 14, 1870, filed a bill to foreclose the same, upon which, July 3, 1874, a decree was entered; that, September 15, 1874, the road was sold to the defendant, M. Hildreth Bloodgood, for $500,000, and that the sale was confirmed and a deed made to the purchaser; that, M. H. Bloodgood, January 28, 1875, conveyed the property to John Bloodgood and Frederick Schuchardt; that, January 29, 1875, Schuchardt and Bloodgood conveyed the same to Daniel Torrance, for an expressed consideration of $1,750,000; that, January 30, 1875, said Torrance and wife conveyed the property to the Ohio and Mississippi Railway Company, for an expressed consideration of $1,750,000; that on the same day the railway company (Torrance and wife joining) conveyed the same by mortgage trust deed to the Farmers' Loan and Trust Company to secure an issue of $3,000,000 of bonds; that, by a law of Illinois, passed May 7, 1873, it was enacted that the consent of two-thirds of the stockholders should be necessary to the validity of such a mortgage; that sixty days' notice of the meeting of stockholders should be given, and that the resolution authorizing the mortgage should be recorded in all the counties through which the road should run. It is alleged that none of these proceedings were had before the execution of the mortgage to the Farmers' Loan and Trust Company, Janu-

ary 30, 1875; that, about $2,000,000 of the bonds secured by said mortgage were turned over to Daniel Torrance in payment for said property; that the Bloodgoods, Dillinger and Langhaar are large holders of the bonds of the Ohio and Mississippi Railway Company, secured by said mortgage.

That, November 17, 1876, William King, and others, filed their bill in the United States Circuit Court, for the District of Indiana, against the Ohio and Mississippi Railway Company, and others, alleging the existence of, among other mortgages, the one dated January 30, 1875 to the Farmers' Loan and Trust Company, and that William King was the owner of certain of the bonds secured thereby; that said bill alleged the insolvency of the railway company and sought the sale of all the property thereof, including said Springfield Division; that a receiver was appointed in said case, who is in possession of, and operating, all of said roads, including said Springfield Division.

That interest is in default on the bonds secured by said mortgage of January 30, 1875, and there is danger that the Trustee may proceed to foreclose, unless said conveyance of said Springfield Division to the Ohio and Mississippi Railway Company, and the mortgage made thereon by said company be declared void.

That the complainant, Dimpfel, is the owner of one thousand shares of the common stock of the Ohio and Mississippi Railway Company, and the complainant, Callahan, of five hundred such shares, and that by the said wrongful proceedings of the company and said Torrance, the value of said stock has been greatly de-

preciated; that, the Board of Directors of the defendant company is largely composed of, and its management controlled by, persons who were, on January 30, 1875, either then directors of said company, or then largely interested in the said Springfield Railway.

AMENDMENTS TO AMENDED BILL.

To this amended bill, the following averments are added by the pleading, marked "Amended Bill B":

That the complainants were not informed of the negotiations for the sale of the Springfield Division at the time the same were pending in the years 1874–5, and had no notice whatever of any proposed contract by which the said Schuchardt and Bloodgood proposed to transfer the said Springfield and Illinois South-Eastern Railway to the control of the Ohio and Mississippi Railway Company; that they were wholly ignorant of the said transaction, and of the fact that the Ohio and Mississippi Railway Company had taken possession of said Springfield Division, and of the making of said mortgage thereon, until October, 1876, after the filing of the bill by said William King and others, and the appointment of the receiver in that case.

That said Torrance knew of, and took part in, an arrangement made between Schuchardt and Bloodgood, by which the said Springfield road was purchased in their behalf for $500,000, and yet said Torrance agreed that he would deliver to them bonds for $2,000,000, secured upon said property in payment for the same; that the complainants did not know of these things until May, 1878, when Dimpfel filed a protest with the Board

of Directors; that it was not until October, 1879 that complainants knew that the said Schuchardt was largely interested in the original Springfield mortgage bonds, and that he and said Bloodgood were acting for the former owners of the Springfield Division; that the Board of Directors were also ignorant of the purchase of the Springfield Division, and of the making of said mortgage, until considerable time after the execution of the same, and until after the transaction had been consummated; that the action of the board, and of the stockholders, if any such was had, ratifying said transactions, was not with full knowledge, and were void; that the execution of said mortgage by said Torrance, as President of the Ohio and Mississippi Railway Company, was without authority, and that Torrance and wife joined in said mortgage, so that if the transaction was set aside as to the railway company, the title would remain in them; that Bloodgood and Schuchardt received $2,000,000 of the bonds secured by said mortgage, for the former owners of the Springfield Division, and had full notice of the want of authority to make the same; that the bonds themselves contained notice that they were not secured upon property which the Ohio and Mississippi Railway Company could own, or made for a lawful purpose; that all the holders of said bonds are affected with notice; that the original bill, herein, was filed shortly after the complainant, Diempfel, had notice of said transaction; that the complainant, Callahan, was ignorant of said transactions until long after the filing of said bill.

ANSWER OF RAILWAY COMPANY.

The Ohio and Mississippi Railway Company, by leave, filed an answer, admitting the material allegations of the bill, and alleging the invalidity of the mortgage and bonds made to the Trust Company. The same relief was asked as in the bill, and that the answer might stand as a cross-bill. (Record, p. 63).

ARGUMENT.

The complainants say they are the holders of fifteen hundred shares of the common stock of the Ohio and Mississippi Railway Company. The whole number of preferred and common shares is *two hundred and thirty-five thousand.* No other stockholders have availed themselves of the invitation to come in.

It is not alleged that either of the complainants held their shares, or any shares, at the time of the transfer of the Springfield road to the Ohio and Mississippi Railway Company. So far as appears the shares may have been acquired at the moment of filing the bill, and for the purpose of qualifying the complainants to sue.

The bill does not contain any sufficient averment that the complainants had, in good faith, sought relief through the Board of Directors, or through a stockholders' meeting.

It does not allege that the suit is not collusive.

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain, in a Court of Equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

"Some action, or threatened action, of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization. * * *

"But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the Court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. * * * * * * *

"The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, *and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law*, and that the suit is not a collusive one, to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

Hawes *v.* Oakland, 104 U. S., 450.

These principles were promulgated by this Court as an "additional rule in Equity, January 23, 1882.

In the bill here, it is alleged that the board of directors never authorized the purchase of the Springfield Division, and have never ratified it.

But if these complainants had made a case entitling them to present any cause of action which the Ohio and Mississippi Railway Company might have had, there was still a want of equity in the bill.

The bill seeks to annul the deed of Torrance to the railroad company, and the mortgage and bonds made by the railroad company to the Farmers' Loan and Trust Company, upon the ground that the Ohio and Mississippi Railway Company had no power to acquire the railroad known as the Springfield Division. It is not claimed that the law of Illinois forbade the consolidation of the two roads; nor that after consolidation the Ohio and Mississippi Railway Company—if that name had been retained—might not lawfully have made the mortgage and bonds. If the purchasers of the Springfield road, at the sale under the decree, had first formally re-organized that company, and then consolidated with the other company, no question would have been made as to the power of the consolidated company to own and operate both roads, and to make and issue the mortgage and bonds.

There is not only no legislative policy of Illinois unfavorable to the consolidation of these two companies, but the early and uniform policy has been to encourage the consolidation of railroad companies owning intersecting or continuous lines, whether within or without the State.

Private Laws 1851, p. 89, sec. 15.

Genl. R. R. Law 1854, (R. S. Ills., 1869).

Private Laws 1861, p. 508, sec. 3.

Act March 26, 1872, (R. S. Ills. 1874, p. 294).

The laws of Indiana were not only equally favorable to consolidations, but as has been shown by our associate counsel in the brief filed, expressly authorized the purchase of one road by another.

The original act of incorporation of the Ohio and Mississippi Railroad Company by the State of Indiana in 1848, expressly empowered the company to extend its road eastwardly to Cincinnati in Ohio, and westwardly through Illinois to St. Louis. It was evidently intended to secure for this Indiana corporation the recognition and sanction of the States of Ohio and Illinois, and to provide for the construction of a railroad from Cincinnati to St. Louis. The Legislature of Ohio recognized this Indiana corporation, and empowered it to act in the former State. In like manner the Legislature of Missouri recognized the Illinois corporation, and authorized it to exercise its franchises in the former State. In Illinois the legislation took the form of an incorporation of that State, but plainly had reference to a union with the Indiana corporation.

COULD THE O. & M. TAKE THE PROPERTY?

If this question is to be judged by the laws of Illinois alone, as we have already said, there can be no question that a legal transfer of the property under the laws of Illinois might have been made by the process of consolidation pointed out by the statutes of that State. As the property then stood, these forms could not be literally followed; but we think the Court may well treat the transaction as a consolidation of the two companies. The statutes of Illinois expressed the legislative consent that the Ohio and Mississippi Company might operate the Springfield road. In deciding this case below, the Hon. Thomas Drummond, Circuit Judge, said:

"It is to be observed, that in view of the legislation of the State of Illinois upon this subject, great liberality

should be exercised as to the contract in controversy in this case. Both by the legislation of the State, and by the construction of the same by its highest Court, great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management; the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under a uniform system. For example, nothing is more common now than the union of different lines of railroad by means of leases of one to the other, the authority for which is given, not so much under particular as under general laws of the State. It should be further observed, that in authorizing, by the general language which has been referred to in the legislation of this State, the union and consolidation of different lines of road, the means by which the result is to be, or has been obtained, have not been clearly designated—but that has been left to be adjusted by contracts mutually executed between the parties.

"There can be no doubt, I think, that it was competent for the Ohio and Mississippi Railway Company, under the laws of this State, to acquire the right of operating the Springfield Division, and whether the operation of the road was under the special act creating the Springfield & Illinois Sotheastern Railroad Company, or under that which authorized the original and consolidated railway between Illinoistown and Vincennes, may not be very material in this case. Neither can it be material whether this result was accomplished by virtue of a special contract of lease, or otherwise, made with the Springfield & Illinois Southeastern Company, or by virtue of a contract of purchase of that railroad.

"Again, it must be borne in mind, that the courts in recent times, have been extremely liberal in the con-

struction of powers of railroad corporations to accomplish the general scope and objects of their creation, and that the question of *ultra vires* has not been, of late years construed with that strictness that existed in former times. So that in view of these and other considerations that might be mentioned, I think it is a fair inference from the legislation on the subject, and the decisions of the courts, as well those of Illinois, as of the Supreme Court of the United States, that the contract by which the Springfield Division was purchased by the Ohio and Mississippi Railway Company could not be considered as *ultra vires*, but was, on the contrary, a valid contract, and this independent of the legislation of the State of Indiana, by which in great part, this consolidated line of railroad running through the three States has been constructed and operated."

Dimpfel *v.* O. & .M. Ry Co., 9 Biss. 129.

If the Ohio and Mississippi Railway Company consolidated, was authorized to exercise in Illinois the charter powers of the Indiana company before the consolidation, then there can be no question of its power to buy the Springfield road. The general rule is, that a consolidated railroad company possesses all the powers of the constituent companies.

Ruggles *v.* People, 91 Ill. 260.

Chicago, etc., R. R. *v* Moffett. 75 id. 524.

We see no reason why this rule would not equally apply to the consolidation of railway companies of different States, in the absence of any restriction in the statutes of either.

IF CONTRACT WAS ULTRA VIRES.

But if the transfer of the Springfield road to the Ohio and Mississippi Company was *ultra vires*, as to the

last named company, it does not at all follow that the complainants are entitled to the relief sought. It is not every such contract that will be set aside by a Court of Equity. In the case at bar, the contract has been fully executed. The Ohio and Mississippi Company in January, 1875, took possession of the Springfield railroad, with all its property and appurtenances, and has ever since remained, and still is in the use and enjoyment of the property and its income. The question here is, whether in this state of the case, either the railroad company or one of its stockholders can have a standing n a Court of Equity to avoid the payment of the stipulated price. That the Ohio and Mississippi Railway Company should assume to own, and to convey by deed of trust, to secure an issue of bonds, a railway in the State of Illinois, extending from Beardstown to Shawneetown, was not on its face the assumption of power which it might not possess.

Under the laws of Illinois, there were lawful ways by which it might have acquired such ownership. A purchaser of these bonds, in open market, would not be advised that the contract was *ultra vires*, as the appellants claim, by the mere recital that the bonds were secured by a mortgage on the Springfield road.

"The sound rule upon the subject we understand to be this: that a private corporation will be estopped to set up the defence of *ultra vires* in respect to all acts and contracts within the apparent scope of its powers; and that both private and public corporations will be estopped to set up such defects in their establishment or organization, or in the preliminaries to the execution of their acts, as are peculiarly within their own knowl-

edge, and notice of which can not be justly imputed to the other party."

Bigelow on Estoppel, p. 466.

The rule, as to private corporations, such as a railroad, is that the plea of *ultra vires* shall not prevail when instead of advancing justice it would accomplish a wrong.

"A private corporation can not avail itself of the defence of *ultra vires* when the contract has, in good faith, been performed by the other party, and the corporation has had the benefit of it."

Darst *v.* Gale, 83 Ill. 140.

Whitney Arms Co., *v.* Barlow, 63 N. Y. 62.

Bradley *v.* Ballard, 55 Ill. 413.

Zabriskie *v.* Railroad Co., 23 How. 381.

Bissell *v.* Michigan Southern Railroad, 22 N. Y. 258.

In the case of Bradley *v.* Ballard, *supra*, the Court, in discussing this question, say: "Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter the company would have no power to build steamboats for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway. Could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment on the ground that, although it has and uses

the steamer, it had no authority to do so by its charter? Or, suppose that instead of having a vessel built by a contractor it employs a superintendent to build it, and hires mechanics by the day. Could it escape the payment of their wages on the ground that it had employed them in a work *ultra vires?*"

"In cases of such character, courts simply say to corporations, you can not in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter."

"While courts are inclined to maintain with vigor the limitations of corporate actions whenever it is a question of restraining the corporations in advance from passing beyond the boundary of their charters, they are equally inclined, on the other hand, to enforce against them contracts, through *ultra vires*, of which they have secured the benefit."

Gas Co. *v.* San Francisco, 9 Cal. 453.

Argenti *v.* San Francisco, 16 Cal. 256.

Gold Mining Co. *v.* National Bank, 96 U. S. 640.

Contracts within the general scope of the powers of a corporation, but in excess in some particulars, are valid, unless against public policy.

Insurance Co. *v.* Dheim, 43 Wis. 421.

State Board *v.* Citizens' R. R. Co. 47 Ind. 407.

In Western Union Telegraph Co. *v.* Western, etc., R. R. Co., 1 Otto. 283, where the defense of *ultra vires* was insisted upon, the Court, (Justice Miller), says:

"We do not decide whether this be so or not. Whenever the railroad company or the State, shall cease to use the wire, shall abandon the contract and leave the instrument severely alone, and the complainant shall then seek to compel compliance with the contract, it will be time to decide that question. But, so long as this company, by the use of the wire and the apparatus, gets the benefit of the contract, it must also abide the terms in other respects."

Good Intent Co. *v.* Hartzell, 22 Penn. 277.

LACHES.

But if this contract might have been impeached at the time by a stockholder, who moved promptly in the assertion of his rights, the complainants have been guilty of laches and can not now be heard to assert the invalidity of the mortgage and bonds as against the innocent holders of them. In deciding this case below, the Circuit Judge, Hon. Thomas Drummond, said upon this question:

"The contract of purchase was made by the Ohio and Mississippi Railway Company in January, 1875. From that time up to the date of filing the bill in this case, the Springfield Division was operated as an integral part of the Ohio and Mississippi Railway Company, and in fact, was merged in the consolidated company. This was an act public in its character, and must be presumed to have been known to all the stockholders of the Ohio and Mississippi Railway Company, and, so far as we know, no objection was interposed to their action until the filing of the bill in this case, on the 12th day of September, 1878. Nearly four years, therefore, had passed since the acquisition of the Springfield Division, and its continued operation as a part of the consolidated

company, before objection was made by any stockholder. During that time the relations of the various parties became changed in consequence of this action of the railway company. The mortgage had been made and bonds issued. They had passed into the hands of *bona fide* purchasers on the faith of the contracts made, and which had been enforced without objection for several years. It would seem that if there was any serious question as to the power of the railway company to make this contract, execute this mortgage and issue these bonds, it ought to have been made at an earlier day, and that it is not competent now, either for the railway company or for its stockholders, to object that what was done was beyond the power of the company.

"It is impossible, in the nature of things, to place all parties as they were before this contract and mortgage were executed, and that consideration has always had great weight in the decision of questions of this kind."

See also Pacific R. R. *v.* Missouri Pacific, 2 McCrary, 228.

Zabriskie *v.* Railroad Co., 23 How. 381.

"Before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the corporation, he must have shown himself prompt and vigilant in the assertion of his rights as such stockholder. It will not do for him to wait until the mischief of which he complains is accomplished, fortunes expended, and great public interests created."

Chapman *v.* Mad. River, etc., Railroad, 6 Ohio St. 119.

State *v.* Van Horn, 7 Ohio St., 329.

In the case at bar, the mortgage deed which is sought to be annulled, was executed on the 30th of January, 1875, and the larger part of the bonds secured by the

mortgage at once passed into other hands. The bill was filed September 12, 1878. It is alleged that the complainants had no knowledge of the purchase of the Springfield Division until October, 1876. We do not think a stockholder can be allowed to be ignorant of the fact that the corporation has taken possession of, and is publicly and openly operating another line of railroad. But if he may, we have here an interval of nearly two years after knowledge was brought home, before the filing of this bill, and an interval of nearly four years after the corporation had assumed the ownership and use of the Springfield Division. To be sure, it is alleged that some of the details of the transfer were not known to the complainants until May, 1878; but these were mere details, and related to a fraud that seems to be intimated rather than alleged, in the bill. By the complainant's own confession he laid by for nearly two years, and allowed these bonds to pass from hand to hand, before he invoked the aid of the Court to annul the transaction.

"It is enough to show circumstances which are reasonably calculated to satisfy the court, or a jury, that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry." Green's, Brice's *Ultra Vires*, p. 466. *Sherman* v. *Fitch*, 98 Mass. 59.

In *Society for Savings* v. *New London*, 29 Conn. 192, the Court say: "The proceedings of the city in issuing the bonds were well known to all the citizens, we must consider them as conversant with the votes of April 14th and July 31st, and everything that was done under the votes; the issuing of the bonds in the name of the city; the delivery of them to the New London, Willi-

mantic and Palmer Railroad Corporation for their use; the advertisement of them in the public papers; and the fact that they were bought by honest purchasers, from time to time, for the ultimate benefit of the citizens themselves. They knew, too, that the bonds were taken by the treasurer of the State as security for the issues of bank paper. If all this was without authority, why, we ask, did not the citizens then make their objections? Why did they not enjoin the city agents from further proceedings? At least why did they not give notice to the public, and put purchasers on their guard, when they knew that grievous loss must ensue if the bonds were unauthorized? We must believe that, after such acquiescence, it would be an outrage upon morality and justice, and an impeachment of the integrity of the citizens of New London, to allow the city to repudiate its obligations for such a cause * * * As we have already said, if we may look through the body to notice the individuals as distinct from the corporation, we must notice them as individuals throughout the proceedings upon which we have been commenting, and then we see them sitting with folded hands, silently countenancing the usurption and fraud of which they are now complaining."

The answer of the Ohio & Mississippi Railway Company shows that in October, 1875, a stockholders' meeting took action upon the transaction and ratified it.

Before receiving the very careful brief of our associate counsel, Messrs. Hoadley, Johnson & Colston, we had prepared the foregoing suggestions and citations, and though probably now unnecessary we venture to submit them.

B. HARRISON,
W. H. H. MILLER,
HOADLEY, JOHNSON & COLSTON,
For Farmer's Loan & Trust Co.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 135.

FREDERICK P. DIMPFEL AND JOHN R. CALLAGHAN, APPELLANTS,

vs.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY, DANIEL TORRANCE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1880.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the honorable Thomas Drummond, judge of the seventh judicial circuit, presiding judge of said court, and the honorable Samuel H. Treat, district judge of said district, associate judge of said court, on Saturday, the 19th day of June, at the June term of said court, in the year of our Lord eighteen hundred and eighty, and of our Independence the one hundred and fourth year.

J. A. JONES, *Clerk.*

FREDERICK P. DIMPFEL AND JOHN R. CALLAGHAN
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY, DANIEL TORRANCE, LYDIA J. TORRANCE, JOHN BLOODGOOD, M. HILDRETH BLOODGOOD, CHARLES DELLINGER, HENRY L. LANGHAAR, AND THE FARMERS' LOAN AND TRUST COMPANY. } In equity.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that heretofore, to wit, on the 12th day of September, in the year of our Lord eighteen hundred and seventy-eight, came said complainant, by Charles W. Hassler, esq., and Perry Belmont, esq., his solicitors, and filed in the office of the clerk of said court his bill in chancery in said cause, which is in the following words, to wit:

3 *Bill.*

In the circuit court of the United States for the southern district of Illinois, in the seventh circuit.

FREDERICK P. DIMPFEL, COMPLAINANT,
and
THE OHIO AND MISSISSIPPI RAILWAY COMPANY, DANIEL TORRANCE, SOPHIA J. TORRANCE, and the Farmers' Loan and Trust Company, as trustee, defendants. } In equity.

To the judges of the circuit court of the United States for the southern district of Illinois:

You[r] orator, Frederick P. Dimpfel, a resident of the city of Baltimore and State of Maryland, and a citizen of said State, on his own behalf, as hereinafter stated, and on behalf of all others in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit, brings this his bill of complaint against the Ohio and Mississippi Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Ohio, Indiana, and Illinois, and a citizen of said States, against Daniel Torrance and Sophia J. Torrance, residents and citizens of the State of New York, and against the Farmers' Loan and Trust Company, a corporation organized and existing under

and by virtue of the laws of the State of New York, and a citizen of said State, as trustee.

4 And thereupon your orator complains and says:

First. The general assembly of the State of Illinois did, on or about the 12th day of February, 1851, pass an act entitled "An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes," in and by which it was enacted that certain persons therein named, and such others as might associate with them, were thereby made and constituted a body corporate and politic by the name and style of the Ohio and Mississippi Railroad Company, with perpetual succession, and by that name and style to be capable in law of taking, purchasing, holding, leasing, selling, and conveying estate and property, whether real, personal, or mixed, so far as the same might be necessary for the purposes thereinafter mentioned, and no further.

And by the second section of said act it was enacted that the said Ohio and Mississippi Railroad Company should have full power and authority to locate, and from time to time to alter, change, relocate, construct, reconstruct and fully to finish, perfect, and maintain a railroad, with one or more tracks, commencing at Illinoistown, on the Mississippi River, in the county of St. Clair, and running thence on the most eligible route to the east line of the State of Illinois in the direction of the city of Vincennes, in the State of Indiana. And certain powers, rights, privileges, franchises, and immunities were in and by said act granted to said company for the purpose of enabling it to construct and operate its said railroad through the entire line thereof, all as will more fully and at large appear by reference to a copy of said act.

And in and by the sixteenth section of said act the said company was authorized, from time to time, to borrow such sum or sums of money as might be necessary for completing or finishing or operating their said railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises, or

5 convey the same by deed of trust, to secure the payment of any debt contracted by said company for the purposes aforesaid.

On or about the 22d day of June, 1852, the general assembly of the State of Illinois passed an act entitled "An act amendatory of an act entitled 'An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes, approved February 12th, 1851,'" in and by which the said railroad company was authorized to borrow money and issue its corporate bonds therefor, and secure the same by mortgage trust-deed, and sell and dispose of the same at such time and places, either within or without the State, and at such rates and for such prices as would best advance the interests of said company.

And by an act passed by the general assembly of said State on or about the 11th day of February, 1853, said company was authorized to elect a vice-president who should, in the absence or disability of the president, have the same power and perform the duties appertaining to the office of president, and such other duties as might be assigned to said vice-president by the by-laws or by resolution of the board of directors.

By a further act passed by the general assembly of said State on or about the 27th day of February, 1854, the said Ohio and Mississippi Railroad Company was authorized to extend their railroad by one or more tracks

from Illinoistown to the Mississippi River, within certain limits named in said amendatory act, and with certain privileges therewith to be connected.

On or about the 23d day of February, 1853, the general assembly of the State of Missouri passed an act authorizing the said railroad company, so incorporated as hereinbefore stated, to purchase and hold all such lands and real estate in the city of St. Louis as might be necessary for the purpose of enabling the said company to carry on its business in said city.

Second. On or about the 1st day of July, 1852, the said Ohio and
6 Mississippi Railroad Company did execute their certain mortgage trust-deed to secure an issue of bonds, dated on that day, to be known as first-mortgage bonds, and to amount in the aggregate to the sum of $850,000, payable on the first day of July, 1872, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the maturity thereof. All said bonds were issued and disposed of for value.

On or about the first day of January, 1854, the said Ohio and Mississippi Railroad Company did execute their certain mortgage trust-deed to secure an issue of bonds dated on that day, to be known as second-mortgage bonds, and to amount in the aggregate to the sum of $1,500,000, payable on the first day of January, 1874, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the maturity thereof. All said bonds were issued and disposed of for value.

Third. The said railroad company not having paid, but having failed to pay and having defaulted in the payment of interest upon the bonds secured by said second-mortgage trust-deed, the trustees therein filed their bill in this your honors' court, asking a foreclosure of said second mortgage, on account of said default in the payment of interest thereon. And thereupon such proceedings were had that at the March adjourned term, 1862, of your honors' court, a final decree was entered directing a sale of all the property of said mortgagor company covered by said mortgage, to take place on the 2d day of June, 1862, which said sale it was in said decree ordered should be made subject to the principal of the aforesaid first mortgage bonds and to the principal of the aforesaid second-mortgage bonds, both of which should be and remain in full force in law and equity against the purchaser or purchasers and all others, notwithstanding
7 the said decree and the sale therein provided for; and also subject to the payment of certain debts recited at length in said decree.

Fourth. On or about the 5th day of February, 1861, the general assembly of the State of Illinois passed an act entitled "An act to incorporate the Ohio and Mississippi Railway Company, and for other purposes," in and by which it was provided that certain persons therein named, and such others as might associate with them, were thereby made and constituted a body corporate and politic by the name and style of the "Ohio and Mississippi Railway Company," for the purpose of purchasing and taking a conveyance of all the railway property, real and personal, rights and franchises of the Ohio and Mississippi Railroad Company, incorporated as hereinbefore recited, and which said Ohio and Mississippi Railway Company should possess all the powers and privileges conferred on the said Ohio and Mississippi Railroad Company by the aforesaid several acts of the general assembly of the State of Illinois.

And in and by the third section of said act the said corporation was declared to possess the power of assuming any debt or debts, liability or liabilities of the said Ohio & Mississippi Railroad Company, in its discretion, and of issuing bonds secured by mortgage, or otherwise, in its discretion, to secure the payment of them.

Fifth. On the 2d day of June, 1862, after advertisement made as in said decree provided, a sale of the property of the said Ohio and Mississippi Railroad Company covered by the aforesaid second mortgage, was had at the city of Springfield, State of Illinois, and at such sale the Ohio and Mississippi Railway Company became the purchaser thereof in accordance with the power granted to said both corporations by the act of the general assembly hereinbefore referred to. And subsequently, to wit, at
8 the June term, 1862, of this your honors' court, a decree was entered confirming and making final the said sale, and declaring the said railway company to be the purchaser and owner of said property and franchises of the said railroad company and entitled to a good and sufficient deed of conveyance and assignment in fee-simple, subject nevertheless to the principal sum of said first and second mortgage bonds, and the commissioners who had made said sale were ordered and directed, without delay, to execute and deliver a good and valid deed of conveyance and assignment to the said purchaser; and the said railroad company was also directed to deliver possession of its property and franchises unto the said railway company, and to execute and deliver a good and valid deed thereof, and of all its right, title, and interest in and to the same. And thereupon and thereby the said Ohio and Mississippi Railway Company became the owner of the said rights and franchises, and entitled to operate and enjoy the line of railway previously owned, operated and enjoyed by the railroad company in accordance with the act of the general assembly of the State of Illinois, dated the 12th day of February, 1851, and the several acts amendatory thereof as hereinbefore recited.

Sixth. The board of directors of the Ohio and Mississippi Railway Company held a special meeting of said board at the city of St. Louis, on the 21st day of November, 1867, and at said meeting a proposition was presented to consolidate the property and stock of the said Ohio and Mississippi Railway Company so organized as aforesaid, by virtue of the act of the legislature of the State of Illinois, with the property and stock of the Ohio and Mississippi Railway Company, a consolidated corporation organized and existing under and by virtue of the laws of the State of Indiana and Ohio, and thereupon a resolution was unanimously adopted reciting that the said railway company of the State of Illinois did thereby agree to the terms and stipulations contained in a certain paper
9 writing presented at said meeting, which said paper writing was entitled "Articles of consolidation, stipulated and agreed upon, and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio."

On the 18th day of December, 1867, the Ohio and Mississippi Railway Company of Indiana and Ohio was a consolidated corporation, duly organized and existing under and by virtue of the laws of said State; and on that day, at a called meeting of the board of directors of said company, held at its office in the city of Cincinnati, a proposition was presented to

consolidate the property and stock of the said Ohio and Mississippi Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, as is hereinbefore stated; and thereupon a resolution was unanimously adopted reciting that the said consolidated railway company did thereby agree to the terms and stipulations contained in a certain paper writing presented at said meeting, which said paper writing was entitled "Articles of consolidation stipulated, agreed upon, and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio."

And since on or about said 18th day of December, 1867, the said Ohio and Mississippi Railway Company, defendant hereto, has been and now is a consolidated corporation existing within the States of Ohio, Indiana, and Illinois, owning, operating, and enjoying lines of railways within said States, and enjoying certain franchises, rights, privileges, and immunities within the same in accordance with the laws of said several States.

Seventh. On or about the 24th day of December, 1867, the Ohio and Mississippi Railway Company, so consolidated as aforesaid, defendant hereto, resolved to execute, and did as of that date execute, its cer-
10 tain indenture of mortgage in the nature of a trust-deed to Allan Campbell and Samuel U. F. Odell, as trustees, to secure an issue of bonds, to be known as consolidated-mortgage bonds, the principal thereof payable on the first day of January, 1898, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the principal thereof shall have been paid. In and by said mortgage trust-deed the said defendant, for the purpose of securing the payment of each and every of its bonds proposed to be issued, as in said indenture recited, and the interest thereon, according to the true intent and meaning thereof, did grant, sell, assign, and transfer unto the said trustees all and singular the railroad extending from the city of Cincinnati, in the State of Ohio, by way of the city of Vincennes, in the State of Indiana, to the city of East St. Louis, in the State of Illinois, being the same property formerly owned by the two companies, of which said defendant was then recently consolidated, with all the property, real, personal, or mixed, then appertaining thereto or then provided for, or used or intended to be used in connection with said railroad, or that might thereafter be acquired for the purposes of or in connection with the said line of railroad, together with all and singular the franchises, rights, privileges, and immunities, incomes, rents, and profits thereunto belonging, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of bonds secured thereby. And in said indenture it was recited that the aggregate amount of the bonds to be issued should not exceed the sum of six millions of dollars; provided, however, that if and whenever the said mortgagor company might deem it important to connect its railroad with the city of Louisville, the issue of bonds to be secured by said mortgage might be increased beyond the sum of six millions of dollars, to an amount not exceeding the additional sum of nine hundred thousand dollars, such track or connecting road to be conveyed in trust to the said trustees therein named, for the equal use, benefit, and security of all bondholders
11 under said mortgage. It was also in said mortgage trust-deed pro-

vided that of the bonds secured thereby the amount of four millions dollars should be used solely and exclusively for the purpose of taking up at or before maturity the then outstanding bonds previously issued by the aforesaid railway companies so consolidated and forming the mortgagor company. And the total amount of six millions of dollars of said bonds have been issued and sold for a valuable consideration, and are now outstanding, excepting certain thereof which are held in trust to exchange for bonds previously issued as aforesaid. And subsequently, on the 23d day of June, 1869, the said defendant having begun the construction of, and being then engaged in building a branch road to connect its main line with the city of Louisville, did execute its certain mortgage trust-deed, dated on that day, to the trustees named in said indenture, bearing date the 24th day of December, 1867, as aforesaid, conveying to said trustees all and singular the said branch railroad, as then built and to be built, together with all the property of every kind thereunto belonging or thereafter to be acquired, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of bonds secured thereby, and by the mortgage trust-deed, dated said 24th day of December, 1867. And eight hundred thousand dollars of the bonds so authorized to be issued were issued and sold for value, and are now outstanding.

On or about the 25th day of March, 1871, the Ohio and Mississippi Railway Company, so consolidated as aforesaid, defendant hereto, resolved to execute, and did as of that day execute, its certain indenture of mortgage in the nature of a trust-deed, to the said Allan Campbell and Samuel U. F. Odell, as trustees, to secure an issue of bonds, amounting to the sum of four million dollars, and to be known as second-consolidated mortgage and sinking-fund bonds, the principal thereof to be payable on the 1st day of April, 1911, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of
12 April and October in each and every year, until the principal thereof shall have been paid. In and by said mortgage trust-deed the said defendant, for the purpose of securing the payment of each and every of its bonds proposed to be isssed as in said indenture recited, and the interest thereon, according to the true intent and meaning thereof, did grant, sell, assign, and transfer unto the said trustees all and singular the same property previously conveyed in trust to the said trustees by the certain indentures of mortgage dated the 24th day of December, 1867, and the 23d day of January, 1869, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of the bonds secured thereby. And in said mortgage trust-deed provision was also made for a sinking fund for the ultimate redemption of said bonds. And all the said bonds, amounting to the said sum of four million dollars, are now outstanding, except certain thereof which have been purchased by said sinking fund, and are now held in accordance with the terms of said indenture in that regard.

The said mortgage trust-deeds were presently after the dates thereof filed for record, and duly recorded in the manner prescribed by law in the proper offices in the several States in which the property covered thereby was and is situated.

The said Samuel U. F. Odell, trustee aforesaid, has departed this life, but the vacancy thereby created has not been filled, and the said Allan

Campbell is now the sole surviving trustee who can execute the trusts in said indentures established.

Eighth. On or about the 30th day of March, 1869, the general assembly of the State of Illinois passed an act entitled "An act to authorize the Ohio & Mississippi Railway Company to build a branch to connect their road with a bridge or ferry to East St. Louis," in and by which the said company was authorized to locate, build, construct, operate, and maintain a branch railroad between Caseyville and East St. Louis, to
13 connect with any bridge or ferry then existing, or that might thereafter be established between the Illinois shores of the Mississippi river and the city of St. Louis, and granting to said company in respect to the said branch road all the privileges, powers, rights, and franchises in regard to such branch, as were then had and enjoyed in regard to their then present railway.

Ninth. And your orator shows, upon information and belief, that on the 21st day of January, 1870, the Springfield & Illinois Southeastern Railway Company was a corporation existing within the State of Illinois, and formed by consolidation of the Illinois Southeastern Railway Company and the Pana, Springfield & Northwestern Railroad Company, and as such consolidated corporation, having the right, privilege, and franchise of building, owning, operating, and enjoying a line of railway from Shawneetown, on the Ohio River, to Beardstown, or to such other point on the Illinois River as said company might select, and with the right to extend the same to some point on the Mississippi River between Quincy and Rock Island.

And on the said 21st day of January, 1870, the said consolidated company did make and execute its certain mortgage trust-deed to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds to be known as first-mortgage bonds, to the aggregate amount of $3,400,000, the principal thereof payable on the first day of February, 1890, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each and every year until the principal thereof shall have been fully paid. And in and by said mortgage trust-deed the said Springfield & Illinois Southeastern Railway Company, for the purpose of securing the bonds proposed to be issued and the interest thereon, did grant, bargain, sell, enfeoff, release, assign, and convey unto the said Farmers' Loan and Trust Company, as trustee, all and singular the entire line of railroad from Shawneetown to Beards-
14 town, or some other eligible point on the Illinois River, as the same might be finally determined upon, whether made or to be made, with all the property of said company, whether then owned or acquired, or thereafter to be owned or acquired, in trust, nevertheless, for the use, benefit, and security for all persons who might become owners and holders of bonds secured thereby.

At the time of the consolidation aforesaid, contracts had been entered into by said Illinois Southeastern Railway Company and by the Pana, Springfield and Northwestern Railroad Company with certain parties variously known as Dodge, Lord & Co., William P. Cutler, or Cutler, Dodge & Co., and the consolidated company confirmed and recognized the same and made such further contracts that the said parties became entitled to the whole amount of $3,400,000 of the bonds hereinbefore specified.

And your orator avers, upon information and belief that the whole of said issue of bonds were delivered to said contractors and became their property; and that subsequently, by transfer and delivery, the whole amount, or the greater portion thereof became the property of John Bloodgood & Company, a copartnership doing business as bankers and brokers in the city of New York, and composed of John Bloodgood and M. Hildreth Bloodgood.

Tenth. On or about the fourteenth day of January, 1874, the Farmers' Loan and Trust Company, the trustee named in said mortgage trust-deed executed by the said Springfield & Illinois Southeastern Railway Company, on or about the 21st day of January, 1870, filed its bill of complaint in this your honors' court, praying a foreclosure of the said mortgage, and alleging as sufficient reason therefor the failure of said company to pay the interest-coupons maturing upon its bonds secured by said indenture, its inability to earn said interest, and its insolvency, and asking that receivers of said property might be appointed by this court to manage the same and receive the income thereof. And thereupon such proceedings were had that on the 3d day of July, 1874, a final decree was entered in said cause, in which it was found by the court that default had been made in the payment of the interest-coupons; that the company was insolvent, and that the said mortgaged property furnished a security wholly inadequate to respond to or discharge the amount of debt charged against it as aforesaid, and that its income was entirely consumed in the payment of operating expenses. And in said decree it was ordered that said mortgage be foreclosed, and the property covered thereby be sold as an entirety by the master in chancery of this court at public vendue. And afterwards, to wit, on the 15th day of September, 1874, the said master did expose the same to sale, and did sell the same to M. Hildreth Bloodgood for the sum of five hundred thousand dollars, that being the highest and best bid therefor; the said sum to be paid partly in cash and partly in bonds secured by said mortgage, all in accordance with the terms of said decree. And said master did actually receive from said M. Hildreth Bloodgood, in payment of his said bid, the sum of about $40,000 in cash, and the sum of about $3,000,000 in bonds and overdue coupons secured by said mortgage trust-deed. And by a further decree of the court, dated the 18th day of January, 1875, the said sale was approved, ratified, and confirmed, and a deed of conveyance having been executed to said M. Hildreth Bloodgood by said master, a further deed and confirmation from said master was directed to be executed and delivered; and a deed of confirmation, dated said 18th day of January, 1875, was thereupon executed and delivered to said M. Hildreth Bloodgood. And the said railway company, defendant in said action, was required to unite in the execution of such further deed, and said company did unite therein by signing the same by Charles A. Beecher, its then vice-president.

Eleventh. By deed dated the 28th day of January, 1875, the said M. Hildreth Bloodgood granted, sold, and assigned all the said property, premises, rights, and things so purchased by him as aforesaid to Frederick Schuchardt and John Bloodgood, for and in consideration of the sum of five hundred thousand dollars, lawful money of the United States, as is in said deed fully recited.

Twelfth. By deed dated the 29th day of January, 1875, the said Fred-

erick Schuchardt and wife, and John Bloodgood and wife, granted, sold and assigned all the said property, premises, rights, and things so transferred as aforesaid by said M. Hildreth Bloodgood, to Daniel Torrance, for and in consideration of the sum of one million seven hundred and fifty thousand dollars, lawful money of the United States, as is in said deed fully recited.

Thirteenth. By deed dated the 30th day of January, 1875, the said Daniel Torrance, and Sophia J. Torrance, his wife, purported to grant, sell, and assign all the said property, premises, rights, and things so transferred as aforesaid, by deed from said Schuchardt and Bloodgood to the Ohio and Mississippi Railway Company, for and in consideration of the sum of one million seven hundred and fifty thousand dollars, lawful money of the United States, as is in said deed fully recited.

Fourteenth. On the same 30th day of January, 1875, aforesaid, the Ohio and Mississippi Railway Company, defendant hereto, purported to execute its mortgage trust-deed to the Farmers' Loan and Trust Company to secure an issue of bonds proposed to be issued by said defendant to the amount of three millions of dollars. And in said indenture it was recited that said defendant was the owner of the line of railroad theretofore belonging to the Springfield and Illinois Southeastern Railway Company, and all the property, premises, rights, and things thereunto belonging, and that said defendant was desirous of borrowing money to improve its said line of railroad and increase the equipment thereof. And by said indenture defendant purported to grant, bargain, sell, assign, and convey unto the said Farmers' Loan and Trust Company, as trustee, all and singular the said premises, rights, and things so transferred to said company by deed of said Daniel Torrance and wife, dated said same day, and being the same property formerly owned by the Springfield and Illinois Southeastern Railway Company as aforesaid.

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And the said Daniel Torrance and Sophia J. Torrance, his wife, were named in said mortgage trust-deed as parties of the third part, and it is therein recited that they became such parties thereto in assurance and confirmation of the same, and thereby granted, released, and conveyed to the said Farmers' Loan and Trust Company, as trustee, all estate, right, title, interest, dower, and right of dower, claim, and demand whatsoever of said Daniel Torrance and said Sophia J. Torrance, his wife, and each of them; provided, however, that they, nor either of them, assumed any personal liability for the payment of any of said bonds or the interest thereon.

And said indenture of mortgage was signed by the Ohio and Mississippi Railway Company, by Daniel Torrance, its president, and attested by W. M. Walton, its secretary, and by the Farmers' Loan and Trust Company, by R. G. Rolston, its president, and attested by Geo. P. Fitch, its secretary, and by Daniel Torrance and Sophia J. Torrance.

Fifteenth. And your orator further shows that the recital in said deed of conveyance, dated said 30th day of May, 1875, that the consideration for the transfer of said property to said defendant was the sum of seventeen hundred and fifty thousand dollars, lawful money of the United States, is incorrect, and that the facts are that certain of said bonds authorized to be issued by said mortgage trust-deed, dated said same 30th day of May, 1875, have been made and executed by said defendant to the amount of two million dollars, or thereabouts, and that the same

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have been paid over to said Daniel Torrance, or as directed by him, in payment for the said property, premises, rights, and things described in said deeds.

Sixteenth. And your orator further shows, upon information and belief, that the said line of railroad aforesaid, then known as the Springfield & Illinois Southeastern Railway, was operated by a receiver appointed by your honors at the suit of the Farmers' Loan and Trust Company aforesaid, for about the period of thirteen months, and that during said period of time the excess of disbursements of said receiver over his receipts was about the sum of $75,000, not including the taxes, amounting to about $20,000, due upon said property for the year 1874, nor the payment of $10,000 made said receiver for his services for said period of time.

And your orator avers that these facts were fully known to the said Frederick Schuchardt and the said Daniel Torrance at the time of the dates of the several deeds aforesaid; and that on the said 28th, 29th, and 30th days of January, 1875, the said Daniel Torrance and said Frederick Schuchardt were directors of the Ohio & Mississippi Railway Company, defendants hereto, and members of the executive and finance committee thereof, and said Daniel Torrance was chairman of said committee and president of said company.

And your orator further avers that the said Frederick Schuchardt was largely interested in the bonds of the said Springfield & Southeastern Railway Company at the same time that he was one of the directors of the defendant company and a member of its executive and finance committee.

19 Seventeenth. And your orator further shows, upon information and belief, that the aforesaid John Bloodgood & Company are the largest owners of said bonds purporting to be issued in payment for the property aforesaid; and that said John Bloodgood & Company are the holders and owners of a majority of the said two million dollars of bonds, and have been the owner and holders thereof since on or about the said 30th day of January, 1875.

Eighteenth. And your orator further shows that on the 17th day of November, 1876, William King, and also John W. Garrett, Robert Garrett, and T. Harrison Garrett, as partners under the firm-name of Robert Garrett & Sons, and James G. Ross, filed their certain bill of complaint in the United States circuit court for the district of Indiana, against the Ohio & Mississippi Railway Company and others, alleging therein, among other things, the existence of the three several mortgage trust-deeds theretofore executed to Campbell and Odell, as trustees, and the mortgage trust-deed to the Farmers' Loan and Trust Company, as trustee, all as hereinbefore recited, and the issue of bonds secured by said mortgages, and further alleging certain defaults in the payment of interest secured by the second mortgage, and in the payment of certain moneys into a sinking fund as in said second mortgage provided.

And said bill of complaint alleged the ownership by said William King of two hundred and fifty thousand dollars of the bonds secured by the mortgage trust-deed executed by the defendant company on the 30th day of January, 1875, as aforesaid, but said bill did not allege any default in the payment of interest on the bonds claimed by said William King, nor any other breach of any of the conditions of said indenture of mortgage.

And your orator shows that the said William King was an employee in the office of the said John Bloodgood & Company, and that the bonds so claimed by him were in fact the property of said John Bloodgood
20 & Company, and were transferred to said William King for the purpose of enabling him to institute said proceedings. And said M. Hildreth Bloodgood was at the date of the instituting of those proceedings a director of the defendant company, and is now a director thereof.

And said bill further alleged the insolvency of the defendant company, its liability to attachments, and aver'ing that it would be necessary to sell all the railroad covered by the mortgages in said bill described, and meanwhile to maintain and operate the same through the agency of a receiver; and said railway company, by Charles A. Beecher, its attorney, who was then and is now a director thereof, immediately appeared to said bill and admitted the truth of the same.

And thereupon such proceedings were had, that Daniel Torrance and John King, jr., were appointed receivers of all the property mentioned in said bill as belonging to said defendant company, and afterwards, by order of said court, the said John King, jr., was appointed sole receiver thereof.

And such proceedings were also had in the United States circuit courts for the southern district of Ohio, and for the eastern district of Missouri, and also in this your honors' court, and in the chancery court of Kentucky, that said John King, jr., is now the sole receiver of all the property owned or claimed to be owned by said defendant company, including the railroad line called the Springfield Division, and formerly known as the Springfield & Illinois Southeastern Railway, as hereinbefore stated, and operates the same under the orders of the several courts aforesaid.

Nineteenth. At or about the 8th day of March, 1878, the said Allan Campbell, as sole surviving trustee named in the mortgage trust-deeds executed by the defendant company, dated the 24th day of December, 1867, and the 23d day of June, 1869, filed his certain bill of complaint in the United States circuit court for the district of Indiana, against the Ohio and Mississippi Railway Company and others, alleging among other things, the execution of the deeds above-named, the issue of bonds there-
21 under, and a default in the payment of certain interest due on said bonds, and praying that he, the said Campbell, might be put in possession of the property covered by the said deeds as trustee in possession, or might be appointed receiver thereof by order of said court.

And thereupon such proceedings were had that the above-named John King, jr., was appointed receiver of all the *the* property covered or claimed to be covered by the mortgage trust-deeds aforesaid, as in said bill of complaint fully set forth, and said John King, jr., is now the receiver thereof.

Twentieth. And your orator shows that the line of railway purporting to be conveyed to the defendant, the Ohio & Mississippi Railway Company, on the 30th day of January, 1875, as aforesaid, does not begin at the Mississippi River, in the county of St. Clair, nor at any point on the said river, and does not run thence on the most eligible route, nor on any other route, to the east line of the State of Illinois in the direction of the city of Vincennes, in the State of Indiana, but lies in an entirely different direction; and the said defendant, the Ohio & Mississippi Railway Company, had no authority or power to be or to become the owner of said line of railway.

Twenty-first. And your orator shows that on the first days of November, 1877, and of May, 1878, interest became due upon the bonds purporting to be secured by the mortgage trust-deed dated the 30th day of January, 1875, as aforesaid, and the same was not paid, but has been wholly defaulted upon; and your orator fears that proceedings may be taken by the trustee named in said deed to enforce the lien purporting to be thereby given, and that unless the said deed of conveyance and the said mortgage trust-deed dated as of the said 30th day of January, 1875, be declared void and of no binding effect whatever upon or against the defendant
22 company a decree may be entered enforcing the same, and also for any balance which, by reason of a claim made under said deeds, might be found due to said trustee, and execution issue against the defendant railway company for the collection thereof.

Twenty-second. And your orator shows that he is the owner and holder of one thousand shares of the common stock of the said defendant, the Ohio & Mississippi Railway Company, of the par value of one hundred dollars each, and amounting in the aggregate to the sum of one hundred thousand dollars at the par value thereof; and that by reason of the actings and doings of the said Daniel Torrance and the said Sophia J. Torrance, and of the said The Ohio & Mississippi Railway Company in purporting to make and execute the deed of conveyance aforesaid, dated on the 30th day of January, 1875, and by the actings and doings of the said Ohio & Mississippi Railway Company in accepting the property purporting thereby to be conveyed, and by reason of the actings and doings of the said Daniel Torrance and the said Sophia J. Torrance, and of the said Ohio & Mississippi Railway Company, and of the said The Farmers' Loan and Trust Company in the purporting to make and execute the mortgage trust-deed aforesaid, dated as of the said 30th day of January, 1875, your orator and the other holders of the common stock of the said defendant, the Ohio & Mississippi Railway Company, have received great damage and injury, and the market value of said stock has been thereby greatly depreciated.

Twenty-third. And your orator further shows that the board of directors is largely composed of, and the management of the defendant company is controlled by, persons who were on the 30th day of January, 1875, aforesaid, either then directors of said company or were then largely interested in the said Springfield & Illinois Southeastern Railway.
23 Wherefore, and inasmuch as your orator has no sufficient remedy in the premises save in this your honors' court of equity, where matters of this kind are properly cognizable and relievable, your orator prays that the said Ohio & Mississippi Railway Company, the said Daniel Torrance, the said Sophia J. Torrance, and the said The Farmers' Loan and Trust Company, as trustee, may be made parties to this his bill of complaint, and be required to answer the same on their several oaths as fully and particularly as if especially interrogated in relation to the matters herein alleged.

That the said deed of conveyance and the said mortgage trust-deed, both dated on the 30th day of January, 1875, may be decreed and declared to be void and of no binding effect whatever upon or against the said The Ohio & Mississippi Railway Company.

And that your orator may have such other and further or different relief in the premises as to your honors may seem meet and just, and in accordance with the rules of this court.

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said Ohio & Mississippi Railway Company, the said Daniel Torrance, the said Sophia J. Torrance, and the said Farmer's Loan and Trust Company, as trustee, the defendants, respectively, therein and thereby commanding them on a day certain to be named and under a certain penalty to be and appear before this honorable court, then and there to answer all and singular the premises and stand to, perform, and abide by such orders and decrees as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience.

24 And your orator, as in duty bound, will ever pray, etc.

CHARLES W. HASSLER,
Solicitor for Complainant.

CHARLES W. HASSLER,
PERRY BELMONT,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederick P. Dimpfel, being duly sworn, deposes and says that he is the complainant above named; that he has read the above bill subscribed by him, and knows the contents thereof; and that the same is true, of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

FREDERICK P. DIMPFEL.

Subscribed and sworn to before me this 13th day of August, 1878.
[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner, South. District of New York.

(Endorsed:) Filed Sep. 12, 1878. J. A. Jones.

25 And afterwards, to wit, on said 12th day of September, in the year aforesaid, there was issued out of said clerk's office a chancery subpœna in said cause, directed to the marshal of said district to execute, which said chancery subpœna, together with the return of the marshal therein, is in the following words, to wit:

26 *Summons.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

The United States of America to Ohio and Mississippi Railway Company, Daniel Torrance, Sophia J. Torrance, and Farmers' Loan Trust Company, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of November next, to answer the bill of complaint of Frederick P. Dimpfel, this day filed in the clerk's office of said court, in said city of

Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, aforesaid, this twelfth day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third year.

[L. S.] J. A. JONES, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Springfield aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

J. A. JONES, *Clerk.*

27 *Return of marshal.*

Executed this writ on the 15th day of Oct., 1878, by delivering a true copy thereof to Hezekiah H. Beecher, ticket-agent of the within-named Ohio and Mississippi Railway Company, neither the president or other higher officers of said railway company found in my district.

E. R. ROE, *U. S. Marshal,*
By N. B. AMES, *Deputy.*

(Endorsed:) Filed October 28, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 4th day of October, in the year aforesaid, there was filed in said clerk's office a bond for costs in said cause, which is in the words and figures following, to wit:

Bond for costs.

Circuit court, United States of America, southern district of Illinois, ss,
June term, A. D. 1878.

FREDERICK P. DIMPFEL
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY et al. } In chancery.

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 30th day of September, 1878.

M. J. SHERIDEM.

(Endorsed:) Filed October 4th, 1878. J. A. Jones, clerk. Bond for costs.

28 And then afterwards, to wit, on the 28th day of October, in the year last aforesaid, came said complainant, by his solicitor, and filed in said clerk's office his amended bills in said cause, which are in the following words, to wit:

Amendment to bill.

United States circuit court, southern district of Illinois.

FREDERICK P. DIMPFEL
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY et al.

Amendments to the bill of complaint in this cause.

1st. In the 2d line of the 4th folio of the bill after the name "Sophia J. Torrance" insert "John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar."

2d. After the word "railway" in the 7th line of the 80th folio of the bill add the words: "And your orator further shows that the owners of the bonds issued as aforesaid and purporting to be secured by the
29 mortgage trust-deed dated as of the 30th day of January, 1875, are very numerous, the majority of whom are unknown to your orator, and therefore cannot be made parties to this bill of complaint; and your orator shows, upon information and belief, that John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar are owners of certain of said bonds, and they are made parties defendant hereto as representatives of the holders of said bonds in order that their rights and the rights of all holders thereof, if any rights they have as such owners or holders may, be fully adjudged and determined."

3d. In the 6th line of the 81st folio of the bill, after the name "Sophia J. Torrance," insert "John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar."

4th. In the 3d line of the 84th folio of the bill, after the name "Sophia J. Torrance," insert "John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar."

5th. In the 3d line of the 60th folio of the bill strike out the
30 word "May" and insert the word "January" in place thereof.

6th. In the 2d line of the 61st folio of the bill strike out the word "May" and insert the word "January" in place thereof.

CHARLES W. HASSLER,
Solicitor and of Counsel for Complainant.

(Endorsed:) Filed October 28th, 1878. J. A. Jones, clerk.

And afterwards, to wit, on said 28th day of October, in the year last aforesaid, came said complainants, by his solicitor, and filed in said clerk's office his bill containing amendments, which is in the following words, to wit:

31 *Copy of bill contain'g amendments.*

In the circuit court of the United States for the southern district of Illinois, in the seventh circuit.

FREDERICK P. DIMPFEL, complainant,
and
THE OHIO AND MISSISSIPPI RAILWAY COMpany, Daniel Torrance, Sophia J. Torrance, and the Farmers' Loan and Trust Company, as trustee, defendants.
} In equity.

To the judges of the circuit court of the United States for the southern district of Illinois:

Your orator, Frederick P. Dimpfel, a resident of the city of Baltimore, and State of Maryland, and a citizen of said State, on his own behalf, as hereinafter stated, and on behalf of all others in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit, brings this his bill of complaint against the Ohio and Mississippi Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Ohio, Indiana, and Illinois, and a citizen of said States, against Daniel Torrance and Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar, residents and citizens of the State of New York, and against the Farmers' Loan and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, as trustee.

32 And thereupon your orator complains and says:

First. The general assembly of the State of Illinois did, on or about the 12th day of February, 1851, pass an act, entitled "An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes," in and by which it was enacted that certain persons therein named, and such others as might associate with them, were thereby made and constituted a body corporate and politic by the name and style of the Ohio and Mississippi Railroad Company, with perpetual succession, and, by that name and style to be capable in law of taking, purchasing, holding, leasing, selling, and conveying estate and property, whether real, personal, or mixed, so far as the same might be necessary for the purposes thereinafter mentioned, and no further.

And by the second section of said act it was enacted that the said Ohio and Mississippi Railroad Company should have full power and authority to locate, and from time to time to alter, change, relocate, construct, reconstruct, and fully to finish, perfect, and maintain, a railroad, with one or more tracks, commencing at Illinoistown, on the Mississippi River, in the county of St. Clair, and running thence on the most eligible route to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana. And certain powers, rights, privileges, franchises, and immunities were, in and by said act granted to said company for the purpose of enabling it to construct and operate its said railroad through the entire line thereof, all as will more fully and at large appear by reference to a copy of said act.

And in and by the sixteenth section of said act the said company was authorized, from time to time, to borrow such sum or sums of money as might be necessary for completing or finishing or operating their said railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises, or con-
33 vey the same by deed of trust, to secure the payment of any debt contracted by said company for the purposes aforesaid.

On or about the 22d day of June, 1852, the general assembly of the State of Illinois passed an act entitled "An act amendatory of an act, entitled 'An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes, approved February 12th, 1851,'" in and by which the said railroad company was authorized to borrow money and issue its corporate bonds therefor, and secure the same by mortgage trust-deed, and sell and dispose of the same at such times and places, either within or without the State, and at such rates and for such prices as would best advance the interests of said company.

And by an act passed by the general assembly of said State on or about the 11th day of February, 1853, said company was authorized to elect a vice-president who should, in the absence or disability of the president, have the same power and perform the duties appertaining to the office of president, and such other duties as might be assigned to said vice-president by the by-laws, or by resolution of the board of directors.

By a further act passed by the general assembly of said State on or about the 27th day of February, 1854, the said Ohio and Mississippi Railroad Company was authorized to extend their railroad by one or more tracks from Illinoistown to the Mississippi River, within certain limits named in said mendatory act, and with certain privileges therewith to be connected.

On or about the 23d day of February, 1853, the general assembly of the State of Missouri passed an act authorizing the said railroad company, so incorporated as herein before stated, to purchase and hold all such lands and real estate in the city of St. Louis as might be necessary for the purpose of enabling the said company to carry on its business in said city.

Second. On or about the 1st day of July, 1852, the said Ohio
34 and Mississippi Railroad Company did execute their certain mortgage trust-deed to secure an issue of bonds, dated on that day, to be known as first-mortgage bonds, and to amount in the aggregate to the sum of $850,000, payable on the first day of July, 1872, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the maturity thereof. All said bonds were issued and disposed of for value.

On or about the first day of January, 1854, the said Ohio and Mississippi Railroad Company did execute their certain mortgage trust-deed to secure an issue of bonds dated on that day, to be known as second-mortgage bonds, and to amount in the aggregate to the sum of $1,500,000, payable on the first day of January, 1874, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the maturity thereof. All said bonds were issued and disposed of for value.

Third. The said railroad company not having paid but having failed to

pay and having defaulted in the payment of interest upon the bonds secured by said second-mortgage trust-deed, the trustees therein named filed their bill in this your honors' court, asking a foreclosure of said second mortgage on account of said default in the payment of interest thereon. And thereupon such proceedings were had that at the March adjourned term, 1862, of your honors' court a final decree was entered directing a sale of all the property of said mortgagor company covered by said mortgage, to take place on the 2d day of June, 1862, which said sale it was in said decree ordered should be made subject to the principal of the aforesaid first-mortgage bonds and to the principal of the aforesaid second-mortgage bonds, both of which should be and remain in full force in law and equity against the purchaser or purchasers, and all others, notwithstanding the said decree and the sale therein provided for; and also subject to the payment of certain debts recited at length in said decree.

Fourth. On or about the 5th day of February, 1861, the general assembly of the State of Illinois passed an act entitled "An act to incorporate the Ohio and Mississippi Railway Company and for other purposes," in and by which it was provided that certain persons therein named, and such others as might associate with them, were thereby made and constituted a body corporate and politic by the name and style of the "Ohio and Mississippi Railway Company," for the purpose of purchasing and taking a conveyance of all the railway property, real and personal, rights and franchises, of the Ohio and Mississippi Railroad Company, incorporated as herein before recited, and which said Ohio and Mississippi Railway Company should possess all the powers and privileges conferred on said Ohio and Mississippi Railroad Company by the aforesaid several acts of the general assembly of the State of Illinois.

And in and by the third section of said act the said corporation was declared to possess the power of assuming any debt or debts, liability or liabilities of the said Ohio & Mississippi Railroad Company, in its discretion, and of issuing bonds secured by mortgage, or otherwise, in its discretion, to secure the payment of them.

Fifth. On the 2d day of June, 1862, after advertisement made as in said decree provided, a sale of the property of the said Ohio and Mississippi Railroad Company covered by the aforesaid second mortgage, was had at the city of Springfield, State of Illinois, and at such sale the Ohio and Mississippi Railway Company became the purchaser thereof in accordance with the power granted to said both corporations by the act of the general assembly herein before referred to. And subsequently, to wit, at the June term, 1862, of this your honor's court, a decree was entered confirming and making final the said sale, and declaring the said railway company to be the purchaser and owner of said property and franchises of the said railroad company and entitled to a good and sufficient deed of conveyance and assignment in fee-simple, subject, nevertheless, to the principal sum of said first and second mortgage bonds, and the commissioners who had made said sale were ordered and directed, without delay, to execute and deliver a good and valid deed of conveyance and assignment to the said purchaser; and the said railroad company was also directed to deliver possession of its property and franchises unto said railway company, and to execute and deliver a good and valid deed thereof, and of all its right, title, and interest in and to the same. And thereupon and

thereby the said Ohio and Mississippi Railway Company became the owner of the said rights and franchises, and entitled to operate and enjoy the line of railway previously owned, operated, and enjoyed by the railroad company in accordance with the act of the general assembly of the State of Illinois, dated the 12th day of February, 1851, and the several acts amendatory thereof as herein before recited.

Sixth. The board of directors of the Ohio and Mississippi Railway Company held a special meeting of said board at the city of St. Louis, on the 21st day of November, 1867, and at said meeting a proposition was presented to consolidate the property and stock of the said Ohio and Mississippi Railway Company so organized as aforesaid, by virtue of the act of the legislature of the State of Illinois, with the property and stock of the Ohio and Mississippi Railway Company, a consolidated corporation organized and existing under and by virtue of the laws of the States of Indiana and Ohio, and thereupon a resolution was unanimously adopted reciting that the said railway company of the State of Illinois did thereby agree to the terms and stipulations contained in a certain paper
37 writing presented at said meeting, which said paper writing was entitled "Articles of consolidation, stipulated and agreed upon, and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio."

On the 18th day of December, 1867, the Ohio and Mississippi Railway Company of Indiana and Ohio was a consolidated corporation duly organized and existing under and by virtue of the laws of said State, and on that day at a called meeting of the board of directors of said company, held at its office in the city of Cincinnati, a proposition was presented to consolidate the property and stock of the said Ohio and Mississippi Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, as is herein before stated; and thereupon a resolution was unanimously adopted reciting that the said consolidated railway company did thereby agree to the terms and stipulations contained in a certain paper writing presented at said meeting, which said paper writing was enittled "Articles of consolidation stipulated, agreed upon, and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio."

And since, on or about said 18th day of December, 1867, the said Ohio and Mississippi Railway Company, defendant hereto, has been and now is a consolidated corporation existing within the States of Ohio, Indiana, and Illinois, owning, operating, and enjoying lines of railways within said States, and enjoying certain franchises, rights, privileges, and immunities within the same in accordance with the laws of said several States.

Seventh. On or about the 24th day of December, 1867, the Ohio and Mississippi Railway Company, so consolidated as aforesaid, defendant hereto, resolved to execute, and did as of that date execute its cer-
38 tain indenture of mortgage in the nature of a trust-deed to Allan Campbell and Samuel U. F. Odell, as trustees, to secure an issue of bonds, to be known as consolidated-mortgage bonds, the principal thereof payable on the first day of January, 1898, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on

the first days of January and July in each year until the principal thereof shall have been paid. In and by said mortgage trust-deed the said defendant, for the purpose of securing the payment of each and every of its bonds proposed to be issued, as in said indenture recited, and the interest thereon, according to the true intent and meaning thereof, did grant, sell, assign, and transfer unto the said trustees all and singular the railroad extending from the city of Cincinnati, in the State of Ohio, by way of the city of Vincennes, in the State of Indiana, to the city of East St. Louis, in the State of Illinois, being the same property formerly owned by the two companies, of which said defendant was then recently consolidated, with all the property, real, personal, or mixed, then appertaining thereto, or then provided for, or used or intended to be used in connection with said railroad, or that might thereafter be acquired for the purposes of or in connection with the said line of railroad, together with all and singular the franchises, rights, privileges and immunities, incomes, rents, and profits thereunto belonging, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of bonds secured thereby. And in said indenture it was recited that the aggregator amount of the bonds to be issued should not exceed the sum of six millions of dollars; provided, however, that if and whenever the said mortgagor company might deem it important to connect its railroad with the city of Louisville, the issue of bonds to be secured by said mortgage might be increased beyond the sum of six millions of dollars, to an amount not exceeding the additional sum of nine hundred thousand dollars, such track or connecting road to be conveyed in trust to the said trustees therein named, for the equal use, benefit, and security of
39 all bondholders under said mortgage. It was also in said mortgage trust-deed provided, that of the bonds secured thereby the amount of four millions dollars should be used solely and exclusively for the purpose of taking up at or before maturity the then outstanding bonds previously issued by the aforesaid railway companies so consolidated and forming the mortgagor company. And the total amount of six millions of dollars of said bonds have been issued and sold for a valuable consideration, and are now outstanding, except certain thereof which are held in trust to exchange for bonds previously issued as aforesaid. And subsequently, on the 23d day of June, 1869, the said defendant having begun the construction of, and being then engaged in building a branch road to connect its main line with the city of Louisville, did execute its certain mortgage trust-deed, dated on that day, to the trustees named in said indenture, bearing date the 24th day of December, 1867, as aforesaid, conveying to said trustees all and singular the said branch railroad as then built and to be built, together with all the property of every kind thereunto belonging or thereafter to be acquired, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of bonds secured thereby, and by the mortgage trust-deed, dated said 24th day of December, 1867. And eight hundred thousand dollars of the bonds so authorized to be issued were issued and sold for value, and are now outstanding.

On or about the 25th day of March, 1871, the Ohio and Mississippi Railway Company, so consolidated as aforesaid, defendant hereto, resolved to execute, and did as of that day execute, its certain indenture of mortgage in the nature of a trust-deed, to the said Allan Campbell and Samuel

U. F. Odell, as trustees, to secure an issue of bonds, amounting to the sum of four million dollars, and to be known as second consolidated mortgage and sinking fund bonds, the principal thereof to be payable on the 1st day of April, 1911, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually, on the first days of April
40 and October, in each and every year until the principal thereof shall have been paid. In and by said mortgage trust-deed the said defendant, for the purpose of securing the payment of each and every of its bonds, proposed to be issued as in said indenture recited, and the interest thereon, according to the true intent and meaning thereof, did grant, sell, assign, and transfer unto the said trustees all and singular the same property previously conveyed in trust to the said trustees by the certain indentures of mortgage, dated the 24th day of December, 1867, and the 23d day of January, 1869, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of the bonds secured thereby. And in said mortgage trust-deed, provision was also made for a sinking fund for the ultimate redemption of said bonds. And all the said bonds, amounting to the said sum of four million dollars, are now outstanding, except certain thereof which have been purchased by said sinking fund, and are now held in accordance with the terms of said indenture in that regard.

The said mortgage trust-deeds were presently after the dates thereof filed for record, and duly recorded in the manner prescribed by law in the proper offices in the several States in which the property covered thereby was and is situated.

The said Samuel U. F. Odell, trustee aforesaid, has departed this life, but the vacancy thereby created has not been filled, and the said Allan Campbell is now the sole surviving trustee who can execute the trusts in said indentures established.

Eighth. On or about the 30th day of March, 1869, the general assembly of the State of Illinois passed an act entitled "An act to authorize the Ohio & Mississippi Railway Company to build a branch to connect their road with a bridge or ferry to East St. Louis," in and by which the said company was authorized to locate, build, construct, operate, and maintain a branch railroad between Caseyville and East St. Louis, to con-
41 nect with any bridge or ferry then existing, or that might thereafter be established between the Illinois shores of the Mississippi River and the city of St. Louis, and granting to said company in respect to the said branch road all the privileges, powers, rights, and franchises in regard to such branch as were then had and enjoyed in regard to their then present railway.

Ninth. And your orator shows, upon information and belief, that on the 21st day of January, 1870, the Springfield & Illinois Southeastern Railway Company was a corporation existing within the State of Illinois, and formed by consolidation of the Illinois Southeastern Railway Company and the Pana, Springfield & Northwestern Railroad Company, and as such consolidated corporation having the right, privilege, and franchise of building, owning, operating, and enjoying a line of railway from Shawneetown, on the Ohio River, to Beardstown, or to such other point on the Illinois River as said company might select, and with the right to extend the same to some point on the Mississippi River, between Quincy and Rock Island.

And on the said 21st day of January, 1870, the said consolidated company did make and execute its certain mortgage trust-deed to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds to be known as first-mortgage bonds, to the aggregate amount of $3,400,000, the principal thereof payable on the first day of February, 1890, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each and every year until the principal thereof shall have been fully paid. And in and by said mortgage trust-deed the said Springfield & Illinois Southeastern Railway Company, for the purpose of securing the bonds proposed to be issued, and the interest thereon, did grant, bargain, sell, enfeoff, release, assign, and convey unto the said Farmers' Loan and Trust Company, as trustee, all and singular the entire line of railroad from Shawneetown to Beards-
42 town, or some other eligible point on the Illinois River, as the same might be finally determined upon, whether made or to be made, with all the property of said company, whether then owned or acquired, or thereafter to be owned or acquired, in trust, nevertheless, for the use benefit, and security for all persons who might become owners and holders of bonds secured thereby.

At the time of the consolidation aforesaid contracts had been entered into by said Illinois Southeastern Railway Company, and by the Pana, Springfield, and Northwestern Railroad Company, with certain parties variously known as Dodge, Lord & Co., William P. Cutler, or Cutler, Dodge & Co., and the consolidated company confirmed and recognized the same, and made such further contracts that the said parties became entitled to the whole amount of $3,400,000 of the bonds herein before specified; and your orator avers upon information and belief that the whole of said issue of bonds were delivered to said contractors and became their property; and that subsequently by transfer and delivery the whole amount, or the greater portion thereof, became the property of John Bloodgood & Company, a co-partnership doing business as bankers and brokers in the city of New York, and composed of John Bloodgood and M. Hildreth Bloodgood.

Tenth. On or about the 14th day of January, 1874, the Farmers' Loan and Trust Company, the trustee named in said mortgage trust-deed executed by the said Springfield & Illinois Southeastern Railway Company, on or about the 21st day of January, 1870, filed its bill of complaint in this your honors' court, praying a foreclosure of the said mortgage, and alleging as sufficient reason therefor the failure of said company to pay the interest coupons maturing upon its bonds secured by said indenture, its inability to earn said interest, and its insolvency, and asking that receivers of said property might be appointed by this court to manage the same and receive the income thereof. And thereupon such proceedings were
43 had, that on the 3d day of July, 1874, a final decree was entered in said cause, in which it was found by the court that default had been made in the payment of the interest coupons; that the company was insolvent, and that the said mortgaged property furnished a security wholly inadequate to respond to or discharge the amount of debt charged against it as aforesaid, and that its income was entirely consumed in the payment of operating expenses; and in said decree it was ordered that said mortgage be foreclosed, and the property covered thereby be sold as an entirety by

the master in chancery of this court at public vendue. And afterwards, to wit, on the 15th day of September, 1874, the said master did expose the same to sale, and did sell the same to M. Hildreth Bloodgood for the sum of five hundred thousand dollars, that being the highest and best bid therefor, the said sum to be paid partly in cash and partly in bonds, secured by said mortgage, all in accordance with the terms of said decree. And said master did actually receive from said M. Hildreth Bloodgood in payment of his said bid the sum of about $40,000 in cash, and the sum of about $3,000,000 in bonds and overdue coupons secured by said mortgage trust deed. And by a further decree of the court, dated the 18th day of January, 1875, the said sale was approved, ratified, and confirmed, and a deed of conveyance having been executed to said M. Hildreth Bloodgood by said master, a further deed and confirmation from said master was directed to be executed and delivered, and a deed of confirmation, dated said 18th day of January, 1875, was thereupon executed and delivered to said M. Hildreth Bloodgood. And the said railway company, defendant in said action, was required to unite in the execution of such further deed, and said company did unite therein by signing the same by Charles A. Beecher, its then vice-president.

Eleventh. By deed dated the 28th day of January, 1875, the said M. Hildreth Bloodgood granted, sold, and assigned all the said property, premises, rights, and things so purchased by him as aforesaid
44 to Frederick Schuchardt and John Bloodgood, for and in consideration of the sum of five hundred thousand dollars, lawful money of the United States, as is in said deed fully recited.

Twelfth. By deed dated the 29th day of January, 1875, the said Frederick Schuchardt and wife, and John Bloodgood and wife, granted, sold, and assigned all the said property, premises, rights, and things so transferred as aforesaid by said M. Hildreth Bloodgood to Daniel Torrance, for and in consideration of the sum of one million seven hundred and fifty thousand dollars, lawful money of the United States, as is in said deed fully recited.

Thirteenth. By deed dated the 30th day of January, 1875, the said Daniel Torrance and Sophia J. Torrance, his wife, purported to grant, sell, and assign all the said property, premises, rights, and things, so transferred as aforesaid, by deed from said Schuchardt and Bloodgood to the Ohio and Mississippi Railway Company, for and in consideration of the sum of one million seven hundred and fifty thousand dollars, lawful money of the United States, as is in said deed fully recited.

Fourteenth. On the same 30th day of January, 1875, aforesaid, the Ohio and Mississippi Railway Company, defendant hereto, purported to execute its mortgage trust-deed to the Farmers' Loan and Trust Company to secure an issue of bonds proposed to be issued by said defendant to the amount of three millions of dollars. And in said indenture it was recited that said defendant was the owner of the line of railroad theretofore belonging to the Springfield and Illinois Southeastern Railway Company, and all the property, premises, rights, and things thereunto belonging, and that
45 said defendant was desirous of borrowing money to improve its said line of railroad and increase the equipment thereof. And by said indenture defendant purported to grant, bargain, sell, assign, and convey unto the said Farmers' Loan and Trust Company, as trustee, all and singu-

lar, the said premises, rights, and things so transferred to said company by deed of said Daniel Torrance and wife, dated said same day, and being the same property formerly owned by the Springfield and Illinois Southeastern Railway Company as aforesaid.

And the said Daniel Torrance and Sophia J. Torrance, his wife, were named in said mortgage trust-deed as parties of the third part, and it is therein recited that they became such parties thereto in assurance and confirmation of the same, and thereby granted, released, and conveyed to the said Farmers' Loan and Trust Company, as trustee, all estate, right, title, interest, dower, and right of dower, claim and demand whatsoever, of said Daniel Torrance and said Sophia J. Torrance, his wife, and each of them, provided, however, that they nor either of them assumed any personal liability for the payment of any of said bonds or the interest thereon.

And said indenture of mortgage was signed by the Ohio and Mississippi Railway Company, by Daniel Torrance, its president, and attested by W. M. Walton, its secretary, and by the Farmers' Loan and Trust Company, by R. G. Rolston, its president, and attested by Geo. P. Fitch, its secretary, and by Daniel Torrance and Sophia J. Torrance.

Fifteenth. And your orator further shows that the recital in said deed of conveyance, dated said 30th day of January, 1875, that the consideration for the transfer of said property to said defendant was the sum of seventeen hundred and fifty thousand dollars, lawful money of the United States, is incorrect; and that the facts are that certain of said bonds
46 authorized to be issued by said mortgage trust-deed, dated said same 30th day of January, 1875, have been made and executed by said defendant to the amount of two million dollars, or thereabouts, and that the same have been paid over to said Daniel Torrance, or as directed by him, in payment for the said property, premises, rights, and things described in said deeds.

Sixteenth. And your orator further shows, upon information and belief, that the said line of railroad aforesaid, then known as the Springfield & Illinois Southeastern Railway, was operated by a receiver appointed by your honors at the suit of the Farmers' Loan and Trust Company aforesaid, for about the period of thirteen months, and that during said period of time the excess of disbursements of said receiver over his receipts was about the sum of $75,000, not including the taxes, amounting to about $20,000 due upon said property for the year 1874, nor the payment of $10,000 made said receiver for his services for said period of time.

And your orator avers that these facts were fully known to the said Frederick Schuchardt and the said Daniel Torrance at the time of the dates of the several deeds aforesaid; and that on the said 28th, 29th, and 30th days of January, 1875, the said Daniel Torrance and said Frederick Schuchardt were directors of the Ohio & Mississippi Railway Company, defendant hereto, and members of the executive and finance committee thereof, and said Daniel Torrance was chairman of said committee and president of said company.

And your orator further avers that the said Frederick Schuchardt was largely interested in the bonds of the said Springfield & Southeastern Railway Company at the same time that he was one of the directors of the defendant company and a member of its executive and finance committee.

47 Seventeenth. And your orator further shows, upon information and belief, that the aforesaid John Bloodgood & Company are the largest owners of said bonds purporting to be issued in payment for the property aforesaid, and that said John Bloodgood & Company are the holders and owners of a majority of the said two million dollars of bonds, and have been the owners and holders thereof since on or about the said 30th day of January, 1875.

Eighteenth. And your orator further shows that, on the 17th day of November, 1876, William King, and also John W. Garrett, Robert Garrett, and T. Harrison Garrett, as partners, under the firm-name of Robert Garrett & Sons, and James G. Ross, filed their certain bill of complaint in the United States circuit court for the district of Indiana against the Ohio & Mississippi Railway Company and others, alleging therein, among other things, the existence of the three several mortgage trust-deeds theretofore executed to Campbell and Odell, as trustees, and the mortgage trust-deed to the Farmers' Loan and Trust Company, as trustee, all as herein before recited, and the issue of bonds secured by said mortgages, and further alleging certain defaults in the payment of interest secured by the second mortgage and the payment of certain moneys into a sinking fund as in said second mortgage provided.

And said bill of complaint alleged the ownership by said William King of two hundred and fifty thousand dollars of the bonds secured by the mortgage trust-deed executed by the defendant company on the 30th day of January, 1875, as aforesaid, but said bill did not allege any default in the payment of interest on the bonds claimed by said William King, nor any other breach of any of the conditions of said indenture of mortgage.

And your orator shows that the said William King was an employee in the office of the said John Bloodgood & Company, and that the bonds so claimed by him were in fact the property of said John Bloodgood &
48 Company, and were transferred to said William King for the purpose of enabling him to institute said proceedings; and said M. Hildreth Bloodgood was at the date of the instituting of those proceedings a director of the defendant company, and is now a director thereof.

And said bill further alleged the insolvency of the defendant company, its liability to attachments, and aver'ing that it would be necessary to sell all the railroad covered by the mortgages in said bill described, and meanwhile to maintain and operate the same through the agency of a receiver; and said railway company, by Charles A. Beecher, its attorney, who was then and is now a director thereof, immediately appeared to said bill and admitted the truth of the same.

And thereupon such proceedings were had that Daniel Torrence and John King, jr., were appointe dreceivers of all the property mentioned in said bill as belonging to said defendant company, and afterwards, by order of said court, the said John King, jr., was appointed sole receiver thereof.

And such proceedings were also had in the United States circuit courts for the southern district of Ohio, and for the eastern district of Missouri, and also in this your honor's court, and in the chancery court of Kentucky that said John King, jr., is now the sole receiver of all the property owned or claimed to be owned by said defendant company, including the railroad line called the Springfield Division, and formerly known as the Springfield & Illinois Southeastern Railway, as herein before stated, and operates the same under the orders of the several courts aforesaid.

Nineteenth. At or about the 8th day of March, 1878, the said Allan Campbell, as sole surviving trustee named in the mortgage trust-deeds executed by the defendant company, dated the 24th day of December, 1867, and the 23d day of June, 1869, filed his certain bill of complaint in the United States circuit court for the district of Indiana, against the Ohio and Mississippi Railway Company and others, alleging, among other things, the execution of the deeds above-named, the issue of bonds there-
49 under, and a default in the payment of certain interest due on said bonds, and praying that he, the said Campbell, might be put in possession of the property covered by the said deeds as trustee in possession, or might be appointed receiver thereof by order of said court.

And thereupon such proceedings were had that the above-named John King, jr., was appointed receiver of all the property covered or claimed to be covered by the mortgage trust-deeds aforesaid as in said bill of complaint fully set forth, and said John King, jr., is now the receiver thereof.

Twentieth. And your orator shows that the line of railway purporting to be conveyed to the defendant, The Ohio & Mississippi Railway Company, on the 30th day of January, 1875, as aforesaid, does not begin at the Mississippi River, in the county of St. Clair, nor at any point on the said river, and does not run thence on the most eligible route, nor on any other route, to the east line of the State of Illinois in the direction of the city of Vincennes, in the State of Indiana, but lies in an entirely different direction; and the said defendant, The Ohio & Mississippi Railway Company, had no authority or power to be or to become the owner of said line of railway.

Twenty-first. And your orator shows that on the first days of November, 1877, and of May, 1878, interest became due upon the bonds purporting to be secured by the mortgage trust-deed dated the 30th day of January, 1875, as aforesaid, and the same was not paid, but has been wholly defaulted upon; and your orator fears that proceedings may be taken by the trustee named in said deed to enforce the lien purporting to be thereby given; and that unless the said deed of conveyance and the said mortgage trust-deed dated as of the said 30th day of January, 1875, be declared void and of no binding effect whatever upon or against the defendant
50 company a decree may be entered enforcing the same, and also for any balance which by reason of a claim made under said deeds might be found due to said trustee and execution issue against the defendant railway company for the collection thereof.

Twenty-second. And your orator shows that he is the owner and holder of one thousand shares of the common stock of the said defendant, The Ohio & Mississippi Railway Company, of the par value of one hundred dollars each, and amounting in the aggregate to the sum of one hundred thousand dollars at the par value thereof; and that by reason of the actings and doings of the said Daniel Torrance and the said Sophia J. Torrance, and of the said The Ohio & Mississippi Railway Company, in purporting to make and execute the deed of conveyance aforesaid dated on the 30th day of January, 1875, and by the actings and doings of the said Ohio & Mississippi Railway Company in accepting the property purporting thereby to be conveyed; and by reason of the actings and doings of the said Daniel Torrance and the said Sophia J. Torrance and of the said Ohio & Mississippi Railway Company, and of the said The Farmers' Loan and

Trust Company in the purporting to make and execute the mortgage trust-deed aforesaid dated as of the said 30th day of January, 1875, your orator and the other holders of the common stock of the said defendant The Ohio & Mississippi Railway Company have received great damage and injury, and the market value of said stock has been thereby greatly depreciated.

Twenty-third. And your orator further shows that the board of directors is largely composed of, and the management of the defendant company is controlled by, persons who were on the 30th day of January, 1875, aforesaid, either then directors of said company, or were then largely interested in the said Springfield & Illinois Southeastern Railway.

And your orator further shows that the owners of the bonds issued as aforesaid and purporting to be secured by the mortgage trust-deed dated as of the said 30th day of January, 1875, are very numerous, the majority of whom are unknown to your orator, and therefore cannot be made parties this his bill of complaint; and your orator shows upon information and belief that John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar are owners of certain of said bonds, and they are made parties defendant hereto, as representatives of the holders of said bonds in order that their rights and the rights of all holders thereof, if any rights they have as such holders, may be fully adjudged and determined.

51 Wherefore, and inasmuch as your orator has no sufficient remedy in the premises save in this your honor's court of equity, where matters of this kind are properly cognizable and relievable, your orator prays that the said Ohio & Mississippi Railway Company, the said Daniel Torrance, the said Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger and Henry L. Langhaar and the said The Farmers' Loan and Trust Company, as trustee, may be made parties to this his bill of complaint, and be required to answer the same on their several oaths as fully and particularly as if especially interrogated in relation to the matters herein alleged.

That the said deed of conveyance and the said mortgage trust-deed, both dated on the 30th day of January, 1875, may be decreed and declared to be void and of no binding effect whatever upon or against the said The Ohio & Mississippi Railway Company.

And that your orator may have such other and further or different relief in the premises as to your honors may seem meet and just, and in accordance with the rules of this court.

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said Ohio & Mississippi Railway Company, the said Daniel Torrance, the said Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar, and the said Farmers' Loan and Trust Company as trustee, the defendants respectively, therein and thereby commanding them, on a day certain to be named and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises, and stand to perform and abide by such orders and

decrees as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience.

52 And your orator as in duty bound will ever pray, etc.

Solicitor for Complainant.

CHARLES W. HASSLER,
PERRY BELMONT,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederick P. Dimpfel, being duly sworn, deposes and says that he is the complainant above named, that he has read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 12th day of August, 1878.

(Endorsed:) Filed Oct. 28, 1878. J. A. Jones, clerk.

53 And afterwards, to wit, on the 31st day of October, in the year aforesaid, came certain of the defendants in said cause by their solicitors and entered their appearance therein, which is in the following words, to wit:

Appearance.

Circuit court of the United States, southern district of Illinois.

FREDERICK P. DIMPFEL
ag'st
THE OHIO & MISSISSIPPI RAILWAY COMPANY et al. } Chancery.

We hereby enter our appearance as solicitors for the defendants, Daniel Torrance, Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar, to the above-entitled cause.
October 30, 1878.

HENRY CRAWFORD &
PERRY H. SMITH, JR.,
Solicitors.

(Endorsed:) Filed October 31, 1878. J. A Jones, clerk.

54 And afterwards, to wit, on Monday, the 4th day of November, at the June term of said court, in the year aforesaid, the following proceedings were had in said court and entered of record in said cause, to wit:

Entry of appearance.

FREDERICK P. DIMPFEL
vs.
OHIO AND MISSISSIPPI RAILWAY COMPANY et al. } In chancery.

This day came the defendants, Daniel Torrance, Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar by Henry Crawford, esq., and Perry H. Smith, esq., their solicitors, and enter their appearance herein.

And afterwards, to wit, on the 5th day of November, in the year aforesaid, came said defendants by their solicitors, and filed in said clerk's office their demurrer in said cause, which is in the following words, to wit:

Demurrer.

Circuit court of the United States, southern district of Illinois.

55 FREDERICK P. DIMPFEL, COMPLAINANT,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY, Daniel Torrance, Sophia J. Torrance, and the Farmers, Loan and Trust Company as trustee, and others, defendants. } Demurrer. In equity.

The demurrer of the Farmers' Loan and Trust Company, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar, to the bill of complaint of Frederick P. Dimpfel, complainant:

These defendants, respectfully by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these
56 defendants touching the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to the said bill, and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

HENRY CRAWFORD &
PERRY H. SMITH, JR.,
Sol's for Defendants.

Circuit court of the United States, southern district of Illinois.

FREDERICK P. DIMPFEL, COMPLAINANT,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY and others. } In equity.

STATE OF NEW YORK,
County of New York, ss:

57 M. Hildreth Boodgood, upon his oath says that he is one of the defendants in the above-entitled cause, and that the foregoing demurrer to the bill of complaint of said complainant Frederick P. Dimpfel is not interposed for the purpose of delaying the progress of said suit.

M. H. BLOODGOOD.

Subscribed and sworn to before me, a notary public in and for said State, county & city of New York.

Witness my hand and notorial seal, Nov. 2d, 1878.

EDWIN F. COREY,
[L. S.] *Notary Public.*

We, as the solicitors for the said defendants, hereby certify that in our opinion the foregoing demurrer to the said bill of complaint is well founded in law and proper to be interposed in the above cause.

Nov. 4, 1878.

HENRY CRAWFORD.
PERRY H. SMITH, JR.

(Endorsed:) Filed Nov. 5, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 6th day of February, A. D. 1879, there issued out of said clerk's office an alias chancery summons in said cause, which, together with the return of the marshal thereon, is in the following words, to wit:

58 *Alias summons.*

UNITED STATES OF AMERICA,
Southern district of Illinois, ss:

To Ohio and Mississippi Railway Company, impleaded with Daniel Torrance, Sophia J. Torrance, Farmers' Loan and Trust Company, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger and Henry L. Langhaar, greeting:

We again command you, and every of you, as you were before commande', that you appear before our judges of our circuit court of the United States of America for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of March next, to answer the bill and amended bill of complaint of Frederick P. Dimpfel, heretofore filed in the clerk's office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as

shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois, to execute.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Springfield, aforesaid, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and third year.

[L. S.] J. A. JONES, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Springfield, aforssaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

J. A. JONES, *Clerk.*

59 *Return of marshal.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I have appointed, and by these presents do constitute, W. S. Hill my true and lawful deputy to execute the annexed writ, Frederick P. Dimpfel vs. Ohio & Mississippi Railway Co. et al., and to make return of the execution thereof according to law.

E. R. ROE,
U. S. Marshal.

I have served the within writ upon the Ohio and Mississippi Railway Company therein named in the following manner, to wit:

By personally delivering to L. B. Parsons, the president of said railway company, a true copy of the same on the 10th day of Feb'y, 1879.

E. R. ROE,
U. S. Marshal,
By W. S. HILL,
Special Deputy.

W. S. Hill, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and according to law.

W. S. HILL.

Sworn to before me this 10th day of February, A. D. 1879.

[L. S.] RANDOLPH SMITH,
Notary Public.

60 (Endorsement:) Filed March 24, 1879. J. A. Jones, clerk.

And afterwards, to wit, on Wednesday, the 3d day of September, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Demurrer sustained.

FREDERICK P. DIMPFEL
vs.
OHIO AND MISSISSIPPI RAILWAY COMPANY, Daniel Torrance, Sophia J. Torrance, Farmers' Loan and Trust Company, et al. } In chancery.

The demurrer to the bill in this case having been heretofore argued by the counsel of the respective parties and considered by the court, and the court being now sufficiently advised, is of the opinion that the same is well taken, and is sufficient in law to meet and answer the equities contained in said bill, and the court therefore sustains the demurrer to said bill.

Correct—enter. "Sept. 3, '79. T. D."

61 And afterwards, to wit, on the 19th day of June, in the year of our Lord one thousand eight hundred and eighty, came said John R. Callagher, by his solicitor, and filed in said clerk's office his petition in said cause, which is in the following words, to wit:

Petition of Callaghan.

United States circuit court, southern district of Illinois.

FREDERICK P. DIMPFEL
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY et al.

Your petitioner, John R. Callaghan, respectfully shows that he is a citizen of Philadelphia, in the State of Pennsylvania.

That he is the owner and holder of five hundred (500) shares of the common stock of the Ohio and Mississippi Railway Company.

That he has read the bill of complaint in the above-entitled cause and knows the contents thereof.

62 Wherefore your petitioner prays that he may be made party plaintiff herein; that the prayer of said bill of complaint may be granted; and that he may have such other and further or different relief as may be just and in accordance with equity.

And your petitioner will ever pray, &c.

JOHN R. CALLAGHAN.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

John R. Callaghan, being duly sworn, deposes and says that he is the petitioner named in the above petition signed by him, and that the same is true of his own knowledge, and further saith not.

JOHN R. CALLAGHAN.

Subscribed and sworn to before me this 21st day of December, 1878.
[L. S.] A. LUCIUS HENNERSHOTZ,
Notary Public.

(Endorsed:) Filed June 19, 1880. J. A. Jones, clerk.

63 And afterwards, to wit, on the 19th day of June, in the year last aforesaid, came William T. McClintick, by his solicitors, and filed in said clerk's office his application to file answer in said cause, which is in the following words, to wit:

Application to file answer.

Circuit court of the United States, seventh circuit and southern district of Illinois.

FREDERICK P. DIMPFEL ET AL.
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY et al.

THE UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

William T. McClintick, being duly sworn, upon oath says that he is and has been for more than five years last past a director of the Ohio and Mississippi Railway Company; that since October 9, 1879, he has been and now is president of said company; that to the best of his judgment, information, & belief the Springfield division of said railway, including all equipment & other property obtained with said division by said
64 Ohio & Mississippi Railway Company, is not worth more than twelve hundred and fifty thousand dollars, and has only become able to earn enough to pay its running expenses within a few months last past, so that the entire gain of its ownership by the Ohio & Mississippi Railway Company, as affiant is informed and believes, consists of the profits of traffic upon the main line derived from said division as a feeder; that in view of this fact, and moved by a desire to avoid the hazards and losses of litigation, the board of directors of said Ohio and Mississippi Railway Company had before & were when this suit was begun, and have ever since continuously until about October 1st, 1879, engaged in negotiations with Messrs. John Bloodgood & Co., of New York City, who are the principal holders of the bonds of the Ohio and Mississippi Railway Company secured by mortgage upon said Springfield division and which were issued in payment for said division, and with other creditors of said company, for the amicable settlement of all disputes and controversies concerning said
65 railway, and for the scaling, reduction, & funding of the debts of said railway company, so that the Ohio & Mississippi Railway Company might be released from litigation and its railway restored to the custody of its board of directors; that in April, 1879, said negotiations came to an agreement between a committee of said board before that time appointed, whereof William Whiteright is chairman, and said John Bloodgood & Co., by which, as affiant is informed and believes, said committee agreed to procure the cancellation and retirement of all said bonds in excess of 1961 within a reasonable time, and within two years to purchase and cancel forty more of said bonds; and said John Bloodgood & Co. agreed, as affiant is informed and believes, to procure the retirement of

all the residue of said bonds in excess of $1,250,000, and of all coupons maturing before November 1st, 1879, upon said 1,250,000; that to carry this agreement into effect it was necessary to procure the con*tract* of those creditors of the Ohio and Mississippi Railway Company, who by fore-
closure or otherwise had the power to prevent the execution of
66 said agreement; that for this purpose an agreement was, with the aid and assistance of said John Bloodgood & Co., as affiant is informed and believes, prepared, of which a true copy in print is attached to the petition of Wiiliam Whiteright and others, presented in the case of William King and others vs. The Ohio & Mississippi R'y Co. & others pending in this court; and said agreement was, as affiant is informed and believes, during June, July, and August, 1879, circulated for signature, with like knowledge, approval, and consent of said John Bloodgood & Co., and with their verbal agreement, as affiant is informed and believe*d*, to carry the same into full execution whenever signed within a reasonable time by as many of said parties as shou'd be sufficient to insure its success; that it was so signed by such number of said parties referred to as aforesaid within such reasonable time, namely, in September, 1879, and said Bloodgood & Co. were notified thereof by letter of William Whitewright, chairman of said committee, as appears from a copy of
said letter presented with said petition, to which, as well as to said
67 petition and its exhibits, affiant refers for greater certainty; that said Bloodgood & Co. never, so far as affiant knows or believes, until in September, 1879, expressed any dissent from or repudiation of their said agreement, but finally, in answer to said letter, did distinctly repudiate said agreement and refuse to carry it into execution, and based said refusal principally on the ground that this case has been decided in their favor, and that these bonds had thereby attained a greater legal value than when said agreement was made; that said Bloodgood & Co. are conducting the defence in this case, and are the real parties in interest here present by their counsel for that purpose; that they and their friends own the majority of said bonds; that the above circumstances constitute the real reason why said company has not appeared in this case, and that this application for leave to appear and answer is not made for delay, but for purposes of substantial justice.

WILLIAM T. McCLINTICK.

Sworn & subscribed before me this 1st day of Nov., A. D. 1879.
WM. H. BRADLEY, *Clerk.*

68 (Endorsed:) Filed June 19th, 1880. J. A. Jones, clerk.

And afterwards, to wit, on said 19th day of June, in the year last aforesaid, came said complainant, by his solicitor, and filed in said clerk's office his amended bills in said cause; which are in the following words, to wit:

69 *Amended bill A.—June* 19, 1880.

In the circuit court of the United States for the southern district of Illinois, in the seventh circuit.

FREDERICK P. DIMPFEL ET AL., COMPLAINANTS,
and
THE OHIO AND MISSISSIPPI RAILWAY COMPANY ET AL., DEFENDANTS.
} In equity.

To the judges of the circuit court of the United States for the southern district of Illinois:

Your orators, Frederick P. Dimpfel, a resident of the city of Baltimore, and State of Maryland, and a citizen of said State, and John R. Callaghan, a resident of the city of Philadelphia, and State of Pennsylvania, and a citizen of said State, on their own behalf, as hereinafter stated, and on behalf of all others in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit, bring this their amended bill of complaint against the Ohio and Mississippi Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Ohio, Indiana, and Illinois, and a citizen of said States, against Daniel Torrance and Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, residents and citizens of the State of New York, and against the Farmers' Loan and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, as trustee.

70 And thereupon your orators complain and say:

First. The general assembly of the State of Illinois did, on or about the 12th day of February, 1851, pass an act entitled "An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes," in and by which it was enacted that certain persons therein named, and such others as might associate with them, were thereby made and constituted a body corporate and politic, by the name and style of the Ohio and Mississippi Railroad Company, with perpetual succession, and, by that name and style to be capable in law of taking, purchasing, holding, leasing, selling, and conveying estate and property, whether real, personal, or mixed, so far as the same might be necessary for the purposes thereinafter mentioned, and no further.

And by the second section of said act it was enacted that the said Ohio and Mississippi Railroad Company should have full power and authority to locate, and from time to time to alter, change, relocate, construct, reconstruct, and fully to finish, perfect, and maintain a railroad, with one or more tracks, commencing at Illinoistown, on the Mississippi River, in the county of St. Clair, and running thence on the most eligible route to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana. And certain powers, rights, privileges, franchises, and immunities were in and by said act granted to said company for the purpose of enabling it to construct and operate its said railroad through the entire line thereof, all as will more fully and at large appear by reference to a copy of said act.

And by the nineteenth section of said act it was especially provided that the railroad constructed under the said act of incorporation should be confined within ten miles on either side of the great western mail route from St. Louis to Vincennes.

71 And in and by the sixteenth section of said act the said company was authorized, from time to time, to borrow such sum or sums of money as might be necessary for completing or finishing or operating their said railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises, or convey the same by deed of trust, to secure the payment of any debt contracted by said company for the purposes aforesaid.

On or about the 22d day of June, 1852, the general assembly of the State of Illinois passed an act entitled "An act amendatory of an act entitled 'An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes,' approved February 12th," 1851, in and by which the said railroad company was authorized to borrow money and issue its corporate bonds therefor, and secure the same by mortgage trust-deed, and sell and dispose of the same at such times and places, either within or without the State, and at such rates and for such prices as would best advance the interests of said company.

And by an act passed by the general assembly of said State on or about the 11th day of February, 1853, said company was authorized to elect a vice-president, who should, in the absence or disability of the president, have the same power and perform the duties appertaining to the office of president, and such other duties as might be assigned to said vice-president by the by-laws or by resolution of the board of directors.

By a further act passed by the general assembly of said State, on or about the 27th day of February, 1854, the said Ohio and Mississippi Railroad Company was authorized to extend their railroad by one or more tracks from Illinoistown to the Mississippi River, within certain limits named in said amendatory act, and with certain privileges therewith to be connected.

72 On or about the 23d day of February, 1853, the general assembly of the State of Missouri passed an act authorizing the said railroad company, so incorporated as herein before stated, to purchase and hold all such lands and real estate in the city of St. Louis as might be necessary for the purpose of enabling the said company to carry on its business in said city.

Second. On or about the 1st day of July, 1852, the said Ohio and Mississip'i Railroad Company did execute their certain mortgage trust-deed to secure an issue of bonds dated on that day, to be known as first-mortgage bonds, and to amount in the aggregate to the sum of $850,000, payable on the first day of July, 1872, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the maturity thereof. All said bonds were issued and disposed of for value.

On or about the first day of January, 1854, the said Ohio and Mississippi Railroad Company did execute their certain mortgage trust-deed to secure an issue of bonds dated on that day, to be known as second-mortgage bonds, and to amount in the aggregate to the sum of $1,500,000, payable on the first day of January, 1874, and bearing interest at and after the

rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the maturity thereof. All said bonds were issued and disposed of for value.

Third. The said railroad company not having paid, but having failed to pay and having defaulted in the payment of interest upon the bonds se-
73 cured by said second-mortgage trust-deed, the trustees therein named filed their bill in this your honor's court, asking a foreclosure of said second mortgage on account of said default in the payment of interest thereon. And thereupon such proceedings were had that at the March adjourned term, 1862, of your honors' court a final decree was entered directing a sale of all the property of said mortgagor company covered by said mortgage, to take place on the 2d day of June, 1862, which said sale it was in said decree ordered should be made subject to the principal of the aforesaid first-mortgage bonds and to the principal of the aforesaid second-mortgage bonds, both of which should be and remain in full force in law and equity against the purchaser or purchasers and all others, notwithstanding the said decree and the sale therein provided for, and also subject to the payment of certain debts recited at length in said decree.

Fourth. On or about the 5th day of February, 1861, the general assembly of the State of Illinois passed an act entitled "An act to incorporate the Ohio and Mississippi Railway Company, and for other purposes," in and by which it was provided that certain persons therein named, and such others as might associate with them, were thereby made and constituted a body corporate and politic by the name and style of the Ohio and Mississippi Railway Company, for the purpose of purchasing and taking a conveyance of all the railway, property, real and personal, rights, and franchises of the Ohio and Mississippi Railroad Company, incorporated as herein before recited, and which said Ohio and Mississippi Railway Company should possess all the powers and privileges conferred on the said Ohio and Mississippi Railroad Company by the aforesaid several acts of the general assemby of the State of Illinois.

74 And in and by the third section of said act the said corporation was declared to possess the power of assuming any debt or debts, liability or liabilities of the said Ohio & Mississippi Railroad Company, in its discretion, and of issuing bonds, secured by mortgage or otherwise, in its discretion, to secure the payment of them.

Fifth. On the 2d day of June, 1862, after advertisement made as in said decree provided, a sale of the property of the said Ohio and Mississippi Railroad Company, covered by the aforesaid second mortgage, was had at the city of Springfield, State of Illinois, and at such sale the Ohio and Mississippi Railway Company became the purchaser thereof, in accordance with the power granted to said both corporations by the act of the general assembly herein before referred to. And subsequently, to wit, at the June term, 1862, of this your honors' court, a decree was entered confirming and making final the said sale, and declaring the said railway company to be the purchaser and owner of said property and franchises of the said railroad company, and entitled to a good and sufficient deed of conveyance and assignment in fee-simple, subject nevertheless to the principal sum of said first and second mortgage bonds; and the commissioners who had made said sale were ordered and directed, without delay, to execute and deliver a good and valid deed of conveyance and assignment to

the said purchaser; and the said railroad company was also directed to deliver possession of its property and franchises unto the said railway company, and to execute and deliver a good and valid deed thereof, and of all its right, title, and interest in and to the same. And thereupon and thereby the said Ohio and Mississippi Railway Company became the owner of the said rights and franchises, and entitled to operate and enjoy the line
75 of railway previously owned, operated, and enjoyed by the railroad company in accordance with the act of the general assembly of the State of Illinois, dated the 12th day of February, 1851, and the several acts amendatory thereof as herein before recited.

Sixth. The board of directors of the Ohio and Mississippi Railway Company held a special meeting of said board at the city of St. Louis, on the 21st day of November, 1867, and at said meeting a proposition was presented to consolidate the property and stock of the said Ohio and Mississippi Railway Company, so organized as aforesaid by virtue of the act of the legislature of the State of Illinois, with the property and stock of the Ohio and Mississippi Railway Company, a consolidated corporation organized and existing under and by virtue of the laws of the States of Indiana and Ohio; and thereupon a resolution was unanimously adopted, reciting that the said railway company of the State of Illinois did thereby agree to the terms and stipulations contained in a certain paper writing presented at said meeting, which said paper writing was entitled "Articles of consolidation stipulated and agreed upon and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio."

On the 18th day of December, 1867, the Ohio and Mississippi Railway Company of Indiana and Ohio was a consolidated corporation duly organized and existing under and by virtue of the laws of said State, and on that day, at a called meeting of the board of directors of said company, held at its office in the city of Cincinnati, a proposition was presented to consolidate the property and stock of the said Ohio and Mississippi Railway Company, a corporation duly organized and existing under and
76 by virtue of the laws of the State of Illinois, as is herein before stated; and thereupon a resolution was unanimously adopted reciting that the said consolidated railway company did thereby agree to the terms and stipulations contained in a certain paper writing presented at said meeting, which said paper writing was entitled "Articles of consolidation stipulated, agreed upon, and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio."

And since on or about said 18th day of December, 1867, the said Ohio and Mississippi Railway Company, defendant hereto, has been, and now is, a consolidated corporation existing within the States of Ohio, Indiana, and Illinois, owning, operating, and enjoying lines of railways within said States, and enjoying certain franchises, rights, privileges, and immunities within the same in accordance with the laws of said several States.

Seventh. On or about the 24th day of December, 1867, the Ohio and Mississippi Railway Company, so consolidated as aforesaid, defendant hereto, resolved to execute, and did as of that date execute, its certain indenture of mortgage in the nature of a trust-deed to Allan Campbell and Samuel U. F. Odell, as trustees, to secure an issue of bonds to be known as

consolidated mortgage bonds, the principal thereof payable on the first day of January, 1898, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each and every year until the principal thereof shall have been paid. In and by said mortgage trust-deed the said defendant, for the purpose of securing the payment of each and every of its bonds proposed to be issued as in said indenture recited, and the interest thereon, according to the true intent and meaning thereof, did grant, sell, assign, and transfer unto the
77 said trustees all and singular the railroad extending from the city of Cincinnati, in the State of Ohio, by way of the city of Vincennes, in the State of Indiana, to the city of East St. Louis, in the State of Illinois, being the same property formerly owned by the two companies, of which said defendant was then recently consolidated, with all the property, real, personal, or mixed, then appertaining thereto, or then provided for, or used or intended to be used in connection with said railroad, or that might thereafter be acquired for the purpose, of or in connection with the said line of railroad, together with all and singular the franchises, rights, privileges, and immunities, incomes, rents, and profits thereunto belonging, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of bonds secured thereby. And in said indenture it was recited that the aggregate amount of the bonds to be issued should not exceed the sum of six millions of dollars; provided, however, that if and whenever the said mortgag'or company might deem it important to connect its railroad with the city of Louisville the issue of bonds to be secured by said mortgage might be increased beyond the sum of six millions of dollars, to an amount not exceeding the additional sum of nine hundred thousand dollars, such track or connecting road to be conveyed in trust to the said trustees therein named for the equal use, benefit, and security of all bondholders under said mortgage. It was also in said mortgage trust-deed provided, that of the bonds secured thereby the amount of four millions dollars should be used solely and exclusively for the purpose of taking up at or before maturity the then outstanding bonds previously issued by the aforesaid railway companies so consolidated and forming the mortgag'or company. And the total amount of six millions of dollars of said bonds have been issued
78 and sold for a valuable consideration, and are now outstanding, except certain thereof which are held in trust to exchange for bonds previously issued as aforesaid. And subsequently, on the 23d day of June, 1869, the said defendant having begun the construction of, and being then engaged in building, a branch road to connect its main line with the city of Louisville, did execute its certain mortgage trust-deed, dated on that day, to the trustees named in said indenture, bearing date the 24th day of December, 1867, as aforesaid, conveying to said trustees all and singular the said branch railroad as then built and to be built, together with all the property of every kind thereunto belonging or thereafter to be acquired, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of bonds secured thereby, and by the mortgage trust-deed, dated said 24th day of December, 1867. And eight hundred thousand dollars of the bonds so authorized to be issued were issued and sold for value, and are now outstanding.

On or about the 25th day of March, 1871, the Ohio and Mississippi

Railway Company, so consolidated as aforesaid, defendant hereto, resolved to execute, and did as of that day execute, its certain indenture of mortgage in the nature of a trust-deed to the said Allan Campbell and Samuel U. F. Odell, as trustees, to secure an issue of bonds amounting to the sum of four million dollars, and to be known as second consolidated mortgage and sinking fund bonds, the principal thereof to be payable on the 1st day of April, 1911, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of April and October in each and every year until the principal thereof shall have been paid. In and by said mortgage trust-deed the said defendant, for the purpose of securing the payment of each and every of its bonds pro-
79 posed to be issued as in said indenture recited, and the interest thereon, according to the true intent and meaning thereof, did grant, sell, assign, and transfer unto the said trustees all and singular the same property previously conveyed in trust to the said trustees by the certain indentures of mortgage dated the 24th day of December, 1867, and the 23d day of January, 1869, in trust, nevertheless, for the use, benefit, and security of all persons who might become owners and holders of the bonds secured thereby. And in said mortgage trust-deed provision was also made for a sinking fund for the ultimate redemption of said bonds. And all the said bonds, amounting to the said sum of four million dollars, are now outstanding, except certain thereof which have been purchased by said sinking fund, and are now held in accordance with the terms of said indenture in that regard.

The said mortgage trust-deeds were presently after the dates thereof filed for record and duly recorded in the manner prescribed by law in the proper offices in the several States in which the property covered thereby was and is situated.

The said Samuel U. F. Odell, trustee aforesaid, has departed this life, but the vacancy thereby created has not been filled, and the said Allan Campbell is now the sole surviving trustee who can execute the trusts in said indentures established.

Eighth. On or about the 30th day of March, 1869, the general assembly of the State of Illinois passed an act entitled "An act to authorize the Ohio & Mississippi Railway Company to build a branch to connect their road with a bridge or ferry to East St. Louis," in and by which the said company was authorized to locate, build, construct, operate, and maintain a branch railroad between Caseyville and East St. Louis, to connect with any bridge or ferry then existing or that might thereafter be es-
80 tablished between the Illinois shores of the Mississippi River and the city of St. Louis, and granting to said company in respect to the said branch road all the privileges, powers, rights, and franchises in regard to such branch as were then had and enjoyed in regard to their then present railway.

Ninth. And your orators show, upon information and belief, that on the 21st day of January, 1870, the Springfield & Illinois Southeastern Railway Company was a corporation existing within the State of Illinois, and formed by consolidation of the Illinois Southeastern Railway Company and the Pana, Springfield & Northwestern Railroad Company, and as such consolidated corporation having the right, privilege, and franchise of building, owning, operating, and enjoying a line of railway from Shawneetown,

on the Ohio River, to Beardstown or to such other point on the Illinois River as said company might select, and with the right to extend the same to some point on the Mississippi River between Quincy and Rock Island.

And on the said 21st day of January, 1870, the said consolidated company did make and execute its certain mortgage trust-deed to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds, to be known as first-mortgage bonds, to the aggregate amount of $3,400,000, the principal thereof payable on the first day of February, 1890, and bearing interest at and after the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each and every year until the principal thereof shall have been fully paid. And in and by said mortgage trust-deed the said Springfield & Illinois Southeastern Railway Company, for the purpose of securing the bonds proposed to be is-

81 sued and the interest thereon, did grant, bargain, sell, enfeoff, release, assign, and convey unto the said Farmers' Loan and Trust Company, as trustee, all and singular the entire line of railroad from Shawneetown to Beardstown, or some other eligible point on the Illinois River as the same might be finally determined upon, whether made or to be made, with all the property of said company, whether then owned or acquired or thereafter to be owned or acquired, in trust, nevertheless, for the use, benefit, and security for all persons who might become owners and holders of bonds secured thereby.

At the time of the consolidation aforesaid contracts had been entered into by said Illinois Southeastern Railway Company, and by the Pana, Springfield and Northwestern Railroad Company, with certain parties, variously known as Dodge, Lord & Co., William P. Cutler, or Cutler, Dodge & Co., and the consolidated company confirmed and recognized the same, and made such further contracts that the said parties became entitled to the whole amount of $3,400,000 of the bonds herein before specified; and your orators aver upon information and belief that the whole of said issue of bonds were delivered to said contractors and became their property; and that subsequently by transfer and delivery the whole amount, or the greater portion thereof, became the property of John Bloodgood & Company, a copartnership doing business as bankers and brokers in the city of New York, and composed of John Bloodgood and M. Hildreth Bloodgood.

Tenth. On or about the fourteenth day of January, 1874, the Farmers' Loan and Trust Company, the trustee named in said mortgage trust-deed executed by the said Springfield & Illinois Southeastern Railway Company, on or about the 21st day of January, 1870, filed its bill of com-

82 plaint in this your honors' court, praying a foreclosure of the said mortgage, and alleging as sufficient reason therefor the failure of said company to pay the interest coupons maturing upon its bonds secured by said indenture, its inability to earn said interest, and its insolvency; and asking that receivers of said property might be appointed by this court to manage the same and receive the income thereof. And thereupon such proceedings were had that on the third day of July, 1874, a final decree was entered in said cause, in which it was found by the court that default had been made in the payment of the interest coupons, that the company was insolvent, and that the said mortgaged property furnished a security wholly inadequate to respond to or discharge the amount of debt

charged against it as aforesaid, and that its income was entirely consumed in the payment of operating expenses; and in said decree it was ordered that said mortgage be foreclosed, and the property covered thereby be sold as an entirety by the master in chancery of this court at public vendue. And afterwards, to wit, on the 15th day of September, 1874, the said master did expose the same to sale, and did sell the same to M. Hildreth Bloodgood, for the sum of five hundred thousand dollars, that being the highest and best bid therefor, the said sum to be paid partly in cash and partly in bonds secured by said mortgage, all in accordance with the terms of said decree. And said master did actually receive from said M. Hildreth Bloodgood in payment of his said bid the sum of about $40,000 in cash, and the sum of about $3,000,000 in bonds and overdue coupons secured by said mortgage trust-deed. And by a further decree of the court, dated the 18th day of January, 1875, the said sale was approved, ratified, and confirmed, and a deed of conveyance having been executed to said M. Hildreth Bloodgood by said master, a further deed and confirmation from said master was directed to be executed and delivered, and
83 a deed of confirmation, dated said 18th day of January, 1875, was thereupon executed and delivered to said M. Hildreth Bloodgood. And the said railway company, defendant in said action, was required to unite in the execution of such further deed, and said company did unite therein by signing the same by Charles A. Beecher, its then vice-president.

Eleventh. By deed, dated the 28th day of January, 1875, the said M. Hildreth Bloodgood granted, sold, and assigned all the said property, premises, rights, and things so purchased by him as aforesaid to Frederick Schuchardt and John Bloodgood, for and in consideration of the the sum of five hundred thousand dollars, lawful money of the United States, as is in said deed fully recited.

Twelfth. By deed, dated the 29th day of January, 1875, the said Frederick Schuchardt and wife, and John Bloodgood and wife, granted, sold, and assigned all the said property, premises, rights, and things so transferred as aforesaid by said M. Hildreth Bloodgood, to Daniel Torrance, for and in consideration of the sum of one million seven hundred and fifty thousand dollars, lawful money of the United States, as is in said deed fully recited.

Thirteenth. By deed, dated the 30th day of January, 1875, the said Daniel Torrance and Sophie J. Torrance, his wife, purported to grant, sell, and assign all the said property, premises, rights, and things so transferred as aforesaid by deed from said Schuchardt and Bloodgood, to the Ohio and Mississippi Railway Company, for and in consideration of the sum of one million seven hundred and fifty thousand dollars, law-
84 ful money of the United States, as is in said deed fully recited.

Fourteenth. On the same 30th day of January, 1875, aforesaid, the Ohio and Mississippi Railway Company, defendant hereto, purported to execute its mortgage trust-deed to the Farmers' Loan and Trust Company to secure an issue of bonds proposed to be issued by said defendant to the amount of three millions of dollars. And in said indenture it was recited that said defendant was the owner of the line of railroad theretofore belonging to the Springfield and Illinois Southeastern Railway Company, and all the property, premises, rights, and things thereunto belong-

ing, and that said defendant was desirous of borrowing money to improve its said line of railroad and increase the equipment thereof. And by said indenture defendant purported to grant, bargain, sell, assign, and convey unto the said Farmers' Loan and Trust Company, as trustee, all and singular the said premises, rights, and things so transferred to said company by deed of said Daniel Torrance and wife, dated said same day, and being the same property formerly owned by the Springfield and Illinois Southeastern Railway Company as aforesaid.

And the said Daniel Torrance and Sophia J. Torrance, his wife, were named in said mortgage trust-deed as parties of the third part, and it is therein recited that they became such parties thereto in assurance and confirmation of the same, and thereby granted, released, and conveyed to the said Farmers' Loan and Trust Company, as trustee, all estate, right, title, interest, dower, and right of dower, claim, and demand whatsoever of said Daniel Torrance and said Sophia J. Torrance, his wife, and each of them; provided, however, that they nor either of them assumed any personal liability for the payment of any of said bonds or the interest thereon.

85 And said indenture of mortgage was signed by the Ohio and Mississippi Railway Company, by Daniel Torrance, its president, and attested by W. M. Walton, its secretary; and by the Farmers' Loan and Trust Company, by R. G. Rolston, its president, and attested by Geo. P. Fitch, its secretary; and by Daniel Torrance and Sophia J. Torrance.

And your orators further show that the legislature of the State of Illinois did, on or about the seventh day of May, 1873, pass an act in and by which it was enacted that the concurrence of two-thirds of the stockholders of any railroad company should be necessary to the validity of any mortgage executed by such company, and that the notices for such meeting should be given sixty days prior to the date on which the same should be held, and also that the resolution authorizing the bonds and the execution of the mortgage should be recorded in the different counties in which the road should be situated.

And your orators show that none of the proceedings which by said statute it was especially provided should be had prior to the execution of bonds and of the mortgage aforesaid were had, or purported to be had, prior to the execution and to the issue of the said bonds purporting to be issued by said Ohio and Mississippi Railway Company, and the execution of the mortgage, purporting to convey, by way of mortgage, the line of railroad therein described to the Farmers' Loan and Trust Company in trust for the holders of said bonds.

Fifteenth. And your orators further show that the recital in said deed of conveyance, dated said 30th day of January, 1875, that the consideration for the transfer of said property to said defendant was the sum of seventeen hundred and fifty thousand dollars, lawful money of the

86 United States, is incorrect; and that the facts are, that certain of said bonds authorized to be issued by said mortgage trust-deed, dated said same 30th day of January, 1875, have been made and executed by said defendant to the amount of two million dollars, or thereabouts, and that the same have been paid over to said Daniel Torrance, or as directed by him, in payment for the said property, premises, rights, and things described in said deeds.

Sixteenth. And your orators further show, upon information and belief,

that the said line of railroad aforesaid, then known as the Springfield & Illinois Southeastern Railway, was operated by a receiver, appointed by your honors at the suit of the Farmers' Loan and Trust Company aforesaid, for about the period of thirteen months, and that during said period of time the excess of disbursements of said receiver over his receipts was about the sum of $75,000, not including the taxes, amounting to about $20,000, due upon said property for the year 1874, nor the payment of $10,000 made said receiver for his services for said period of time.

And your orators aver that these facts were fully known to the said Frederick Schuchardt and the said Daniel Torrance at the time of the dates of the several deeds aforesaid; and that on the said 28th, 29th, and 30th days of January, 1875, the said Daniel Torrance and said Frederick Schuchardt were directors of the Ohio & Mississippi Railway Company, defendant hereto, and members of the executive and finance committee thereof, and said Daniel Torrance was chairman of said committe' and president of said company.

And your orators further aver that the said Frederick Schuchardt was largely interested in the bonds of the said Springfield & South-
87 eastern Railway Company at the same time that he was one of the directors of the defendant company and a member of its executive and finance committee.

And your orators annex hereto copies of two certain circulars dated August 28th, 1874, and March 3d, 1875, signed by Frederick Schuchart and John Bloodgood, and marked, respectively, "Exhibit A" and "Exhibit B," and prays that the same may be taken as part of this his bill of complaint.

Seventeenth. And your orators further show, upon information and belief, that the aforesaid John Bloodgood & Company are the largest owners of said bonds purporting to be issued in payment for the property aforesaid; and that said John Bloodgood & Company are the holders and owners of a majority of the said two million dollars of bonds, and have been the owners and holders thereof since on or about the said 30th day of January, 1875. And John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar have informed your orators that they are owners of certain of the bonds purporting to have been issued and dated on said 30th day of January, 1875, and at their own request your orators make them parties defendant to this their bill of complaint as such owners and as representatives of all the holders of said bonds. And your orators annex hereto a copy of the mortgage aforesaid, and also a copy of the form of the said bonds and a copy of the form of coupons attached to said bonds, and marked respectively "Exhibit C," "Exhibit D," and "Exhibit E," and pray that the same may be taken as a part of this their bill of complaint.

Eighteenth. And you orators further show that on the 17th day of November, 1876, William King, and also John W. Garrett, Robert
88 Garrett, and T. Harrison Garrett, as partners under the firm-name of Robert Garrett & Sons, and James G. Ross, filed their certain bill of complaint in the United States circuit court for the district of Indiana against the Ohio & Mississippi Railway Company and others, alleging therein, among other things, the existence of the three several mortgage trust-deeds theretofore executed to Campbell and Odell, as trust-

ees, and the mortgage trust-deed to the Farmers' Loan and Trust Company, as trustee, all as herein before recited, and the issue of bonds secured by said mortgages, and further alleging certain defaults in the payment of interest secured by the second mortgage and in the payment of certain moneys into a sinking fund as in said second mortgage provided.

And said bill of complaint alleged the ownership by said William King of two hundred and fifty thousand dollars of the bonds secured by the mortgage trust-deed executed by the defendant company on the 30th day of January, 1875, as aforesaid, but said bill did not allege any default in the payment of interest on the bonds claimed by said William King, nor any other breach of any of the conditions of said indenture of mortgage.

And your orators show that the said William King was an employee in the office of the said John Bloodgood & Company, and that the bonds so claimed by him were in fact the property of said John Bloodgood & Company, and were transferred to said William King for the purpose of enabling him to institute said proceedings. And said M. Hildreth Bloodgood was at the date of the instituting of those proceedings a director of the defendant company, and is now a director thereof.

And said bill further alleged the insolvency of the defendant company, its liability to attachments, and averring that it would be necessary to sell all the railroad covered by the mortgages in said bill described, and meanwhile to maintain and operate the same through the agency of a
89 receiver; and said railway company, by Charles A. Beecher, its attorney, who was then and is now a director thereof, immediately appeared to said bill and admitted the truth of the same.

And thereupon such proceedings were had that Daniel Torrance and John King, jr., were appointed receivers of all the property mentioned in said bill as belonging to said defendant company, and afterwards, by order of said court, the said John King, jr., was appointed sole receiver thereof.

And such proceedings were also had in the United States circuit courts for the southern district of Ohio, and for the eastern district of Missouri, and also in this your honors' court, and in the chancery court of Kentucky, that said John King, jr., is now the sole receiver of all the property owned or claimed to be owned by said defendant company, including the railroad line called the Springfield Division, and formerly known as the Springfield & Illinois Southeastern Railway, as herein before stated, and operates the same under the orders of the several courts aforesaid.

Nineteenth. At or about the 8th day of March, 1878, the said Allan Campbell, as sole surviving trustee named in the mortgage trust-deeds executed by the defendant company, dated the 24th day of December, 1867, and the 23d day of June, 1869, filed his certain bill of complaint in the United States circuit court for the district of Indiana against the Ohio and Mississippi Railway Company and others, alleging among other things the execution of the deeds above named, the issue of bonds thereunder, and a default in the payment of certain interest due on said bonds, and praying that he, the said Campbell, might be put in possession of the property covered by the said deeds as trustee in possession, or might be appointed receiver thereof, by order of said court.

90 And thereupon such proceedings were had that the above-named John King, jr., was appointed receiver of all the property covered or claimed to be covered by the mortgage trust-deeds aforesaid, as in said

bill of complaint fully set forth, and said John King, jr., is now the receiver thereof.

Twentieth. And your orators show that the line of railway purporting to be conveyed to the defendant, the Ohio & Mississippi Railway Company, on the 30th day of January, 1875, as aforesaid, does not begin at the Mississippi River, in the county of St. Clair, nor at any point on the said river, and does not run thence on the most eligible route, nor on any other route, to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana, but lies in an entirely different direction; and the said defendant, the Ohio & Mississippi Railway Company, had no authority or power to be or to become the owner of said line of railway, nor to execute a mortgage upon the same, nor to make and issue the bonds herein before described and purporting to be secured by said mortgage.

Twenty-first. And your orators show that on the first days of November, 1877, and of May, 1878, interest became due upon the bonds purporting to be secured by the mortgage trust-deed dated the 30th day of January, 1875, as aforesaid, and the same was not paid, but has been wholly defaulted upon; and your orators fear that proceedings may be taken by the trustee named in said deed to enforce the lien purporting to be thereby given, and that unless the said deed of conveyance and the said mortgage trust-deed dated as of the said 30th day of January, 1875, and the bonds purporting to be secured by said mortgage trust-deed be declared
91 void, and of no binding effect whatever upon or against the defendant company, a decree may be entered enforcing the same, and also for any balance which by reason of a claim made under said deeds might be found due to said trustee or for any claim which might be made by any holder of any of said bonds, and execution issue against the defendant railway company for the collection thereof.

Twenty-second. And your orator, Frederick P. Dimpfel, shows that he is the owner and holder of one thousand shares of the common stock of the said defendant, the Ohio & Mississippi Railway Company, of the par value of one hundred dollars each, and amounting in the aggregate to the sum of one hundred thousand dollars at the par value thereof; and your orator, John R. Callaghan, is the owner of five hundred shares of said stock; and that by reason of the actings and doings of the said Daniel Torrance and the said Sophia J. Torrance and of the said The Ohio & Mississippi Railway Company, in purporting to make and execute the deed of conveyance aforesaid dated on the 30th day of January, 1875, and by the actings and doings of the said Ohio & Mississippi Railway Company in accepting the property purporting thereby to be conveyed, and in making and issuing its bonds as aforesaid, and by reason of the actings and doings of the said Daniel Torrance and the said Sophia J. Torrance and of the said Ohio & Mississippi Railway Company, and of the said the Farmers' Loan and Trust Company, in the purporting to make and execute the mortgage trust-deed aforesaid, dated as of the said 30th day of January, 1875, your orators and the other holders of the common stock of the said defendant, The Ohio & Mississippi Railway Company, have received great damage and injury, and the market value of said stock has been thereby greatly depreciated.

92 Twenty-third. And your orators further show that the board of directors is largely composed of and the management of the defendant company is controlled by persons who were on the 30th day of Janu-

ary, 1875, aforesaid, either then directors of said company or were then largely interested in the said Springfield & Illinois Southeastern Railway.

Wherefore, and inasmuch as your orators have no sufficient remedy in the premises save in this your honors' court of equity, where matters of this kind are properly cognizable and relievable, your orators pray that the said Ohio and Mississippi Railway Company, the said Daniel Torrance, the said Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, and the said The Farmers' Loan and Trust Company, as trustee, may be made parties to this his bill of complaint, and be required to answer the same on their several oaths as fully and particularly as if especially interrogated in relation to the matters herein alleged.

That the said deed of conveyance and the said mortgage trust-deed and the said bonds, all dated on the 30th day of January, 1875, may be decreed and declared to be void and of no binding effect whatever upon or against the said The Ohio & Mississippi Railway Company.

And that your orators may have such other and further or different relief in the premises as to your honors may seem meet and just and in accordance with the rules of this court.

May it please your honors to grant unto your orators the writ of subpœna of the United States of America, to be directed to the said Ohio & Mississippi Railway Company, the said Daniel Torrance, the said Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, and the said Farmers' Loan
93 and Trust Company, as trustee, the defendants, respectively, therein and thereby commanding them, on a day certain to be named and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises and stand to, perform, and abide by such orders and decrees as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience.

And your orators as in duty bound will ever pray, etc.

CHARLES W. HASSLER,
Solicitor for Complainants.

CHARLES W. HASSLER,
PERRY BELMONT,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederick P. Dimpfel, being duly sworn, deposes and says that he is one of the above-named complainants, and that he has read the bill of complaint herein, and knows the contents thereof to be true, except as to the matters therein stated to be alleged upon information and belief, and as to those he believes it to be true.

F. P. DIMPFEL.

Subscribed and sworn to before me this 12th day of December, 1879.
[L. S.]
HENRY P. BUTLER,
U. S. Commissioner for the Southern District of N. Y.

94 EXHIBIT A.

NEW YORK, *August 28th*, 1874.

Holders of first-mortgage bonds of the Springfield and Illinois Southeastern Railway Company, wishing to join with the holders of a majority of said bonds in such action as may seem to us best for the protection of our common interests, are invited to sign the annexed agreement and forward it to us with their bonds, or the receipt of the Farmers' Loan and Trust Company for the same, endorsed to our order, and a check for fifteen dollars per bond, to be applied to foreclosure expenses and such disbursements as may be necessary to secure title and quiet possession. If no purchase is made by us bonds and money will be returned. No purchase will be made unless necessary to prevent a sacrifice of the property. As the sale takes place on 15th September prompt action is necessary. It is believed that joint and unanimous action in the premises will best protect the interest of all concerned. Those who by neglect or refusal fail to act promptly may imperil their own interests, as we shall, of course, only attempt to protect those who, before the sale, place in our hands their bonds and authority, with the funds necessary for immediate use.

FREDERICK SCHUCHARDT,
40 *Exchange Place.*
JOHN BLOODGOOD,
22 *William Street.*

Exhibit A.

95 EXHIBIT B.

To the holders of bonds of the Springfield and Illinois Southeastern Railway Company:

In compliance with the agreement entered into between yourselves, as holders of first-mortgage bonds and coupons of the Springfield and Illinois Southeastern Railway Company, and ourselves, as your trustees, we purchased on the 15th day of September, 1874, the property and franchises of said company, subject to the unpaid taxes and liens reserved in decree of sale issued by the United States circuit court for the southern district of Illinois, dated July 3d, 1874, for the bondholders, for the sum of five hundred thousand dollars, there being no higher bid, and took title in the name of M. H. Bloodgood. The court at first fixed November 2d, 1874, and subsequently April 28th, 1875, as the date prior to which all bondholders desiring to join in the purchase should signify their assent by surrender of these bonds and the signing the agreement to which we are parties as above mentioned. We paid into court, September 15, 1874, the full five hundred thousand dollars, and received back then and subsequently from the bonds of parties who have joined in the purchase to date $459,506.47, leaving us in advance on this account $40,493.53, part of which may yet be returned from bonds of parties joining in the purchase. This has, however, entailed no inconsiderable loss of interest.

Since the railroad passed into the hands of the receivers we have ascertained that, restricted as it is to local business, the railroad has not paid its operating expenses; and, further, that without a through business, which there is no prospect of obtaining, the road must continue to be a

losing concern, and finally come to a stop. Every railroad which crosses it takes business, but gives none in return, and as we have not the
96 power to compel reciprocity the result would be ruinous to the parties in interest. Under these circumstances the only course left to us to save the bondholders from total loss was to endeavor to lease or sell the property to some connecting line of railroad.

The Ohio and Mississippi Railway Company is the only company whose geographical position enable' it to deal with us advantageously, and, in compliance with the authority conferred upon us by the agreement between the bondholders and ourselves, we entered into negotiations with Mr. Daniel Torrance, with the assent of the holders of more than two millions of the bonds of the Springfield and Illinois Southeastern Railway Company, which resulted in the sale of the property to Mr. Daniel Torrance upon the following terms, which were the best that could be obtained:

1st. That we take the title in our own names and convey the same to Mr. Daniel Torrance, who conveys to the Ohio and Mississippi Railway Company.

2d. The Ohio and Mississippi Railway Company organize the property as the Springfield Division of the Ohio and Mississippi Railway Company.

3d. Mr. Daniel Torrance and wife and the Ohio and Mississippi Railway Company execute a first mortgage upon the said Springfield Division to secure an issue of three millions of dollars, at seven per cent. currency, bonds having thirty years to run.

4th. Mr. Daniel Torrance pay over to your trustees $1,750,000 of these bonds for the property and franchises by us conveyed to him, the Ohio and Mississippi Railway Company reserving the option to pay the interest for two years in bonds of the same issue, which gives us $1,995,000 of the bonds, with two years' coupons cut off.

97 5th. Your trustees to pay off all taxes, receiver's expenses, costs of foreclosure, and all liens, and to convey a clear title to the property. Mr. Daniel Torrance retains 300 of the 1,750 bonds to secure such perfect title and protect the Ohio and Mississippi Railway Company against litigation, said bonds to be returned, from to time, as liens may be discharged and title perfected.

6th. The remaining million of the bonds to be reserved by the Ohio and Mississippi Railway Company to complete the six miles from Pana to Tower Hill, to improve the track and stock of the road with the necessary equipment to move the traffic which they will direct over this branch.

The Ohio and Mississippi Railway Company can make this branch road a most valuable auxiliary to its main line, which in our hands, without means to create a traffic or to purchase additional rolling stock to move such additional traffic, even if it could be obtained, must have remained unproductive and under continued embarrassment. The means to make the purchase as above described and to pay off existing liens have been procured by us upon loans, and should be promptly repaid.

Our advances to date are approximately as below:

Cash in advance, to make purchase	$40,493 53
Paid excess of disbursements by receiver over receipts, as per decree of January 18th, 1875	77,499 76
Other decree, liens, and chattel mortgages settled, about	6,500 00
Foreclosure expenses, interest, costs of court, about	30,000 00
Mortgages on depot grounds	10,000 00
Loss on operating the road, October 1st to March 1st, about	13,000 00
Receiver and manager, for services from January 14th, 1874, to March 1st, 1875	10,000 00
98 Taxes for 1874, to be paid before June 1st, 1875, about	21,500 00
	$208,993 29

A portion of which may be returned to us yet by bondholders joining in the purchase.

The following liens are in litigation or unsettled, and will have to be paid in part or entirely:

Taxes for 1873, about $45,000.

Right of way questions and some disputed claims, amount uncertain.

Against these Mr. D. Torrance holds as aforesaid 300 bonds.

We, therefore, in accordance with the agreement between yourselves and your trustees, call upon you to pay an assessment of fifty dollars per bond, and request payment to be made to us by check.

The Ohio and Mississippi Railway Company have taken possession and are operating the road.

Respectfully,

FREDERICK SCHUCHARDT,
JOHN BLOODGOOD,
Trustees.

P. S.—It has been proposed that the whole issue of three millions of bonds be placed in a syndicate, for the purpose of effecting a sale of the whole of the amount, either here or in Europe.

Will you please signify your assent to this plan if it can be carried out?

FREDERICK SCHUCHARDT,
JOHN BLOODGOOD,
Trustees.

22 WILLIAM STREET, NEW YORK, *March 3d*, 1875.

Exhibit B.

99 EXHIBIT C.

This indenture, made this thirtieth day of January, in the year eighteen hundred and seventy-five, between the Ohio and Mississippi Railway Company, a corporation under the laws of the States of Ohio, Indiana, and Illinois, party of the first part; the Farmers' Loan and Trust Company, of the city of New York, trustee, for the uses and purposes hereinafter mentioned, party of the second part; and Daniel Torrance and Sophia J. Torrance, his wife, of the city of New York, parties of the third part, witnesseth:

Whereas the party of the first part is the owner of a line of railroad in the State of Illinois, of about two hundred and twenty-two miles in length, heretofore belonging to the Springfield and Illinois Southeastern Railway Company, extending from Shawneetown, in the county of Gallatin, on the Ohio River, northwesterly, through or touching at the towns of Fairfield, in Wayne County; Louisville, in Clay County; Pana, in Christian County; Springfield, in Sangamon County, to Beardstown, in Cass County, on the Illinois River, together with the right of way, and all the real and personal property now used or appropriated for operating and maintaining the said line of railroad, including the engines, tenders, cars, tools, machinery, supplies, and all the rights, powers, privileges, franchises, and immunities which said last-named railway company heretofore owned or possessed.

And whereas the party of the first part is desirous of borrowing money to improve its said line of railroad and increase the equipment thereof, and for other purposes connected with the business of the party of the first part, and being duly authorized by its charters so to do, has determined to issue and negotiate its bonds, of even date herewith, numbered consecutively from one to three hundred, inclusive, each for the sum of
100 ten thousand dollars, lawful money of the United States, payable to Frederick Schuchardt, or bearer, on the first day of November, in the year nineteen hundred and five, with interest from the first day of May, eighteen hundred and seventy-five, at the rate of seven per cent. per annum, payable semi-annually at the office or agency of the party of the first part, in the city of New York, on the first days of May and November in each year, until the principal becomes due; and said principal to become due if default is made for six months in the payment of interest thereon; each of said bonds being exchangeable by the owner thereof on demand for ten coupon bonds of same date, tenor, and effect, except being for the sum of one thousand dollars each, or for ten coupon bonds, of same date, tenor, and effect, except being for the sum of two hundred pounds sterling each, and bearing interest at the rate of six per cent. per annum, and the principal and interest thereof being payable in the city of London. And upon any such exchange being made the original bond to be forthwith cancelled, said coupon bonds to be consecutively numbered from one upwards, and to be duly authenticated before being issued by a certificate indorsed thereon and duly signed by the said trustee; and the interest thereon to be payable on the surrender of the coupons; the whole issue of said bonds not to exceed the aggregate sum of three millions of dollars, or six hundred thousand pounds sterling, and the whole to be secured by a first mortgage upon the line of railroad, property, and franchises above mentioned and described.

Now, this indenture witnesseth, that the party of the first part, in consideration of the premises and of the sum of one dollar, to it paid by the party of the second part, the receipt whereof is hereby acknowledged,
101 and for the purpose of securing the payment of said bonds, with the interest thereon, hath granted, bargained and sold, and by these presents doth grant, bargain and sell, convey and confirm, unto the said party of the second part, its successors and assigns, forever, all and singular the line of railroad, right of way, real and personal property, rights, powers, privileges, franchises, and immunities herein before mentioned and

described, and also all the real estate, improvements, rolling stock, machinery, supplies, and other property which the party of the first part may hereafter acquire in respect thereto, and place upon the said line of railroad, or appurtenant thereto, for the efficient maintenance and operation of the same, and also all income, tolls, freights, rents, and profits accruing or to accrue therefrom, and all the rights, privileges, and franchises of the party of the first part belonging or appertaining thereto.

To have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging or in any wise appertaining, unto the said party of the second part, its successors and assigns, forever, in trust, however, to secure the payment of the bonds aforesaid, including all the bonds issued upon the exchange herein before authorized, and the interest accruing thereon, to the lawful holders of the same, equally and without preference or priority to any of said bonds over any of *said bonds over any of* the others by reason of priority in the issue thereof or otherwise.

Provided, always, that if the party of the first part shall well and truly pay the principal and interest of said bonds according to their tenor and effect, then this indenture shall be void, and all the estate and interests hereby conveyed shall determine.

102 And provided, further, that until default is made in the payment of the principal or interest of said bonds, or some of them, or some part thereof, according to their tenor and effect, the party of the first part shall be entitled to continue in the possession, use, and enjoyment of the property hereby granted; and while the party of the first part so remains in possession it shall be lawful for the party of the second part to join with the party of the first part in the conveyance of, and thereby release and discharge from the lien created by this mortgage, any portion of the real estate now held or hereafter acquired, either for depot grounds, machine shops, right of way, or other purposes, whenever by change of plans, relocation of tracks, or any other cause, the same may be no longer used or required for use in or for the operating or maintaining of the said line of railroad.

And provided, further, that if the party of the first part shall make default in the payment of any of said bonds, or of the interest thereon as it falls due, and such default shall continue for six months, then the trustee aforesaid, its successors or assigns, upon the written request of the holders of not less than one-fifth of the principal of said bonds then outstanding, and on which interest or principal shall be in arrear and unpaid, shall enter into and take possession of the line of railroad and property hereby conveyed, and hold, operate, maintain and enjoy the same, and take and receive the income, tolls, freights, rents, and profits thereof and accruing therefrom, and also upon like request shall sell at public auction to the highest bidder the whole of said line of railroad, and all and singular the property, rights, franchises, and things hereby conveyed, and all the right, title, interest, and equity of redemption of the party of the first part, its successors and assigns therein; which sale shall be in the city of New York, or at some place along the line of said railroad, as the said trustee may elect,

103 and shall be, after notice shall have been given by said trustee of the time, place, and terms of sale, with a description of the property to be sold, by advertisement thereof in some newspaper of good cir-

culation published in the city of New York, and in some newspaper of good circulation published in said city of Springfield, at least once in each week for not less than three months immediately preceding the day of sale, together with such other notice, if any, as by law may be absolutely necessary to render such sale valid; and upon such sale being made said trustee or its successor or successors shall be and is hereby fully authorized and empowered to make, execute, and deliver to the purchaser or purchasers good and sufficient deeds of conveyance of all and singular the line of railroad, property, franchises, and things hereby conveyed, and all the right, title, interest, and equity of redemption of the party of the first part, its successors and assigns therein; and the party of the first part hereby covenants with the party of the second part that it will make, do, execute, and deliver all such further deeds and conveyances, act, and things as said trustee or its successor or successors shall be reasonably advised by counsel may be necessary or proper to confirm and assure either the security hereby intended to be given to the holders of said bonds or the title and ownership of the property to the purchaser or purchasers at such sale; and in case of sale being made as aforesaid the purchaser or purchasers thereat shall be entitled to deliver to said trustees, towards the payment of the purchase-money any of the bonds or coupons to the payment of which the net proceeds of such sale shall be legally applicable, to the extent to which such bonds or coupons shall be entitled out of the net proceeds of such sale, and the said trustee, out of the revenues of the road or the proceeds of the sale thereof as aforesaid, shall be entitled to re-
104 tain and pay all necessary and proper costs and charges connected therewith and the carrying into effect of this trust, including all proper legal expenses, counsel fees, and expenditures in and about the care, management, maintenance, operation, and protection of the property, payment of taxes, assessments, or other incumbrances which may be liens on said property, or any part thereof, having priority over this mortgage, and shall apply the net balance to the payment pro rata of all the then outstanding bonds and coupons in arrears, but the net earnings and revenues of the road before any sale thereof is made as aforesaid, after payment of the costs and charges appertaining thereto, shall be first applied by said trustee to or towards the payment of accrued interest; and any surplus, after paying all of the proceeds of such sale and of the net revenues of the road, the costs and charges aforesaid, and all of said bonds and accrued interest in full, shall be paid to the party of the first part, its successors or assigns; and the said party of the first part, for itself, its successors and assigns, hereby agrees to waive, and doth hereby absolutely and irrevocably waive and relinquish, the benefit or advantage of any and all valuation, stay, appraisement, extension, or redemption law or laws now existing, or which may hereafter be passed by the State of Illinois, which, but for this provision, agreement, and waiver, might be applicable to the sale herein before authorized to be made by the trustee or trustees of the said railroad and other mortgaged premises, or to any judicial sale which may be made of said mortgaged railroad and premises, or any part thereof, under and in virtue of the judgment or decree of any competent court in a suit instituted for the foreclosure of this mortgage, or for enforcement of the lien by this indenture created; and the said party of the first part, for itself, its successors and assigns, agrees to waive, and doth

105 hereby irrevocably waive, any and all right of redemption which it might or could otherwise have or be entitled to under any present or future law of the State of Illinois, upon or after or in respect of any sale of the said hereby mortgaged premises, properties, rights, and franchises, or any part thereof, which may be made either by the trustee or trustees under the power herein before contained, or as a judicial sale under order or decree of a court in a suit for foreclosure of this mortgage or enforcement of its lien as aforesaid; and the said party of the first part hereby covenants that it will not in any manner set up or seek to take the benefit or advantage of any such present or future valuation, stay, appraisement, extension, or redemption law to prevent or hinder or delay the absolute and irredeemable sale of said mortgaged premises, properties, rights, and franchises as herein before authorized to be made by the trustees, or as might, but for such law, be directed or decreed by a court of competent jurisdiction.

And it is hereby further provided, declared, and agreed that the trustee, under this indenture, or its successor or successors, may at any time be removed from the trust, by instrument in writing, under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys in fact thereunto authorized.

And it is further declared, provided, and agreed that in case a vacancy shall at any time exist in the trusteeship hereunder, by reason of removal, death, or mental incapacity of the trustee or trustees for the time being, or either of them, or of the resignation of any such trustee accepted, in writing, by a majority in interest of the bondholders or by a court of competent jurisdiction, or of a vacancy in such trusteeship otherwise lawfully occurring and existing, a majority in amount of the holders of

106 the then outstanding bonds, issued under and secured by this indenture of mortgage, shall have the right and power, by instrument in writing under hand and seal, to appoint a new trustee or trustees to fill such vacancy; and in case the vacancy shall be caused by the party of the second part or any corporation appointed in its place ceasing to be trustee, such vacancy may be so filled by the bondholders by the appointment, as trustee, of another corporation having lawful power to execute such trust, or of one or more individual trustees; and until the appointment of a trustee or trustees to fill any vacancy shall have been made by the majority in interest of the said bondholders, under the power in that behalf above contained, the board of directors for the time being of the party of the first part may appoint a new trustee or trustees to fill such vacancy for the time being; and in case of any vacancy being filled by such appointment by the board of directors, it shall be competent for any court of equitable powers having jurisdiction in the premises, upon the application of any of the bondholders holding not less than five hundred thousand dollars in amount of such bonds, to annul such appointment, and appoint a trustee or trustees in place of the trustee or trustees so appointed by the directors, to hold the trust for the like term as he or they would have held the same under the appointment of the said directors, but no longer.

And in case of any vacancy occurring and not being filled by a majority in interest of the bondholders under the preceding provisions in that behalf, it shall be the duty of the president of the said railway com-

pany to call a meeting, on a notice of at least three weeks published once a week for three successive weeks in two newspapers of good circulation published in the city of New York, of the bondholders, to be held in the city of New York, to appoint a trustee or trustees to fill the vacancies so
107 existing or which shall have existed; but nevertheless such vacancy may be filled without waiting for and irrespective of any such meeting, by instrument or concurrent instruments under hand and seal of a majority in interest of such bondholders; and any appointment of a trustee or trustees to fill such vacancy existing, or which shall have existed, whether made at such meeting, called as aforesaid, or otherwise, provided it be under the hands and seals of a majority in interest of the holders of the then outstanding bonds hereby secured, or their attorneys in fact thereunto unauthorized, but not otherwise, shall be valid and effectual, and shall supersede any previous appointment of a trustee to fill such vacancy which may have been made by the board of directors of the said company, or by a court, under any of the preceding provisions hereof.

And it is hereby provided, declared, and agreed, that the due appointment of a trustee or trustees, in any of the modes herein provided, shall be effectual to vest in such trustee or trustees the appropriate estate, rights, powers, and duties, as herein provided in that behalf, without any new deed or conveyance; but, nevertheless, the said railway company hereby covenants, in any and every such case, to make and execute, upon request, any such deeds, conveyances, or assurances, as may be appropriate for more fully and certainly vesting in and confirming to such new trustee such estate, rights, powers, and duties, and in every case of resignation of a trustee, the resigning trustee shall, if requested, make and execute such deeds, conveyances, or assurances to his successor.

And it is hereby further provided, declared, and agreed, that in case of the trustee or trustees hereunder entering upon and taking possession of the said railway and other mortgaged premises or property in conse-
108 quence of default made by said railway company, under or in pursuance of the power and authority in that behalf hereinbefore conferred upon the trustee, it shall be lawful and competent for such trustee or trustees to employ an agent or agents for the performance of any such duties, acts, and things, in and about taking and maintaining such possession, and using, operating, and managing the said railway, and collecting the income, earnings, and profits thereof, and making repairs and improvements as above authorized, as such trustee or trustees may deem fit, and for the performance of any other acts in and about such possession and management, the performance whereof can be properly delegated to an agent, and that such trustee or trustees, provided it or they shall have exercised reasonable prudence and care in the selection and employment of such agent or agents for any of such purposes, shall not be responsible for losses or damages in the premises caused by the act, neglect, or default of such agent or agents. But this provision is not intended, and shall not be construed so as to exempt the trustee or trustees, in case of sale being made of the said mortgaged premises, from due responsibility to the bondholders hereby secured for the due application of the proceeds of such sale, received either by the trustee or trustees, or by any agent or agents whom it or they may seem fit to employ to receive such proceeds of sale.

And this indenture further witnesseth that the said party of the first

part, for the considerations aforesaid, has covenanted, promised, and agreed, and does hereby covenant, promise, and agree to and with the said party of the second part and its successor or successors in the trust hereby created, that the said party of the first part, and its successors, shall and will well and truly pay, or cause to be paid, unto the respective holders of the said bonds for three million dollars, or six hundred thousand pounds sterling, issued under and secured by this mortgage, the principal thereof
109 and the interest thereon, as the same shall from time to time become payable, according to the tenor of said bonds and the coupons accompanying the same respectively.

And the said party of the second part hereby accepts the trust created by this indenture.

And this indenture further witnesseth that the said Daniel Torrance, Sophia J. Torrance, his wife, parties of the third part, and grantors to the party of the first part of the property herein mortgaged, execute this indenture as parties hereto in assurance and confirmation of the same, and do hereby grant, release, and convey to the party of the second part, as trustee as aforesaid, and to its successors and assigns forever, all estate, right, title, interest, dower, and right of dower, claim and demand whatsoever of the said Daniel Torrance and Sophia J., his wife, and of each or either of them, whether present or future, in, to, or in respect of the railroad and other premises and properties, rights, and things aforesaid, or any and every part thereof, to be had and holden by the said party of the second part, as such trustee, for the security of the said bonds and the interest thereon, and upon the trusts, and with and subject to the provisions hereinbefore contained or declared, and to the like extent and effect, as if the said Daniel Torrance and Sophia J., his wife, had united as grantors with the party of the first part in this indenture; provided, always, that the said Daniel Torrance and Sophia J. Torrance, his wife, do not, nor does either of them, assume any personal liability for the payment of any of said bonds or the interest thereon.

In witness whereof the parties of the first and second parts have respectively caused these presents to be executed by their presidents, attested by their secretaries, and their corporate seals to be hereunto
110 affixed, and the parties of the third part have hereunto set their hands and seals, the day and year first above mentioned.

[L. S.] OHIO AND MISSISSIPPI RAILWAY CO.,
By D. TORRANCE, *President.*

Attest:
W. M. WALTON, *Secretary.*

[L. S.] THE FARMERS' LOAN AND TRUST CO.,
By R. G. ROLSTON, *President.*

Attest:
GEO. P. FITCH, *Secretary.*

DANIEL TORRANCE. [L. S.]
SOPHIA J. TORRANCE. [L. S.]

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this eighteenth day of February, A. D. one

thousand eight hundred and seventy-five, before me, William H. Clarkson, a commissioner of the State of Illinois in and for the State of New York, residing in said city of New York, personally appeared Daniel Torrance, the president of the Ohio and Mississippi Railway Company, and William M. Walton, the secretary of the same company, who are personally
111 known to me to be the president and secretary of said company, and, being duly sworn, they did depose and say that he, the said Daniel Torrance, resided in the city of New York, in the State of New York; that he, the said William M. Walton, resided in the city of Elizabeth, in the State of New Jersey; that he, the said Daniel Torrance, was the president of said company; that he, the said William M. Walton, was the secretary of the same company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said company, was such corporate seal; that it was so affixed thereto by order of the executive and finance committee of the board of directors of said company, and that they signed their names thereto by the like order as the president and secretary of said company respectively. And the said Daniel Torrance and William M. Walton also acknowledged to me that they signed, sealed, and delivered the said instrument as their free act and deed, and the free act and deed of the said Ohio and Mississippi Railway Company, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this eighteenth day of February, A. D. one thousand eight hundred and seventy-five.

[SEAL.] WILLIAM H. CLARKSON,
Commissioner for Illinois in New York.

112 STATE OF NEW YORK,
City and County of New York, ss:

On this 18th day of February, A. D. 1875, before me, William H. Clarkson, a commissioner for the State of Illinois in and for the State of New *Yew* York, residing in said city of New York, personally appeared Daniel Torrance and Sophia J. Torrance, his wife, who are personally known to me to be the real persons whose names are subscribed to the foregoing instrument, and acknowledged that they had signed, sealed, and delivered the said instrument as their free act and deed, for the uses and purposes therein expressed, including the release and waiver of the right of homestead.

In witness whereof I have hereunto set my hand and affixed my official seal this 18th day of February, A. D. 1875.

[SEAL.] WILLIAM H. CLARKSON,
Commissioner for Illinois in New York,
117 *Broadway, N. Y. City.*

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this 23d day of February, A. D. 1875, before me, William H. Clarkson, a commissioner of the State of Illinois in and for the State of New York, residing in said city of New York, personally appeared R. G. Rolston, the president of the Farmers' Loan and Trust Company, of the city of New York, and George P. Fitch, the secretary of

117 *Amended bill B.—June* 19, 1880.

United States circuit court, southern district of Illinois.

FREDERICK P. DIMPFEL ET AL.
versus
THE OHIO AND MISSISSIPPI RAILWAY COMPANY et al. } In equity.

Now come the complainants, and, by leave of court first had and obtained, for further amendments to their bill of complaint, and supplemental thereto, add the words and figures following after the twenty-third clause thereof:

Twenty-fourth. Your orators further show that although the negotiations as hereinbefore set forth were had between the said Daniel Torrance and Frederick Schuchardt, as of the one party, and the said Frederick Schuchardt and John Bloodgood, as of another party, during parts of the years 1874 and 1875, yet the fact is that they were not only not informed in regard to the same at the time they were in progress, and had no notice whatever of any proposed contract by which the said Schuchardt and Bloodgood proposed and pretended, with the consent and assistance of said Shuchardt and Torrance, to transfer the said Springfield and Illinois Southeastern Railway to the control of the Ohio and Mississippi Railway Company, defendant herein, but they were wholly ignorant of the said transaction and of the fact that the said railway company had in any manner taken possession of or assumed control of the said line of railway, or had pretended to make and issue bonds purporting to be secured by a
118 mortgage upon said line until the month of October, 1876, subsequently to the filing of the bill of complaint of one William King, claiming to be the owner of certain bonds purporting to have been so issued and secured, and subsequently to the appointment of the receivers in said action as hereinbefore set forth.

And your orators show, upon information and belief, that said Torrance was cognizant of and took part in an arrangement made between said Schuchardt and said Bloodgood, whereby the said line of railway was purchased in their behalf for the sum of five hundred thousand dollars, and yet the said Torrance agreed that he would deliver to said Schuchardt and Bloodgood bonds purporting to be secured by mortgage on said property amounting to nearly two million dollars as in payment for the same. And not until about the month of May, 1878, did either of these plaintiffs become cognizant of such actings and doings of the said Torrance and Schuchardt, both of whom were then officers of defendant company, in the negotiation for the purchase as aforesaid.

And in the month of May, 1878, to wit, on the 20th day of said month, your orator, Frederick P. Dimpfel, did make and send to the president and board of directors of the defendant railway company a written protest objecting to any action by the board of directors which in any manner might be construed as confirming or legalizing any action theretofore had in regard to obtaining possession of the line of railway formerly known as the Springfield and Illinois Southeastern Railway.

Nor was it until over a year after the filing of the original bill in this cause, namely, until the month of October, 1879, that your orators were

informed that said Schuchardt was largely interested in the said Springfield and Southeastern Railway first-mortgage bonds.

119 And your orators were ignorant of the fact that said Schuchardt and Bloodgood were acting in behalf of the former owners of the bonds of the Springfield and Southeastern Railway Company, and had issued the circulars, copies of which are annexed to the amended bill of complaint, and marked "Exhibits A and B," and they were not cognizant of the same until about the month of October, 1879.

And your orators show, upon information and belief, that the board of directors were ignorant of any negotiation of said Schuchardt and Torrance, and of said Schuchardt and Bloodgood, and of the execution and making of said mortgage and of said bonds until considerable time after the said Torrance had pretended to execute and make the same, and after the said Torrance, and his wife Sophia J. Torrance, had individually signed the said mortgage, and the said transactions had been completed so far as the said Schuchardt and Torrance, and said Schuchardt and Bloodgood, and said Torrance and wife, could complete and consummate the same.

And your orators are advised that any action of the board of directors, if any such was had, or of any of the stockholders, if any such was had, purporting to ratify the action aforesaid, were not with full knowledge of the facts so as to bind them or the company, but were and are wholly void and of no effect whatever.

And your orators show that the mortgage dated the 30th day of January, 1875, purporting to hav*ing* been executed by Torrance as president of the defendant railway, was executed by him wholly without authority, and is of no binding effect upon said defendant; but that subsequently to the transfer by Schuchardt and John Bloodgood and their wives to Torrance, and subsequently to the pretended transfer to the defendant company by Torrance and wife, the said mortgage was executed by said Torrance and wife as parties of the third part thereto, and said

120 Torrance and wife did join in the same as grantors to the party of the first part and executed the same in assurance and confirmation thereof, and conveyed to the Farmers' Loan and Trust Company, as trustee, among other things, all dower and right of dower of said Sophia J. Torrance in and to said property.

And your orators show, upon information and belief, that the said Torrance and his wife did so join in said mortgage, being advised thereto by counsel learned in the law, in order that if, upon any application to the court, the transfer of said property to the defendant railway company should be set aside, then the same might revert to the said Torrance and wife as the lawful owners thereof.

And your orators show that the bonds purporting to be issued by the defendant railway company and delivered to said Torrance, amounting to the sum of nearly two million dollars, were by said Torrance delivered to said Schuchardt and Bloodgood, as a committee representing the Springfield and Illinois Southeastern Railway bondholders, as shown by the two circulars attached to the amended bill herein, and marked "Exhibits A and B," and that said Schuchardt and Bloodgood received the same, being fully cognizant of the facts showing the want of authority of said Torance to make and execute said mortgage and said bonds, and of the fact that no corporate action had been taken in regard to the same, and that the

said Torrance and his wife joined in said deed after they had executed a deed of conveyance of the same to said railway company.

And your orators show that the proposed sale of the said Springfield and Illinois Southeastern Railway was known to said Torrance, and that after his having obtained said knowledge, said Torrance did, in collusion with said Schuchardt, and in fraud of the right of the stockholders of the defendant company, agree to the purchase of the same by said
121 Schuchardt and Bloodgood, and to the subsequent transfer to the said company at a largely increased price, as hereinbefore stated.

And your orators show that each of said bonds so purporting to be issued by defendant company contained notice to all intending owners thereof that they are not secured upon any property which the defendant railway company was by its charter, as hereinbefore set forth, authorized to own; and that they were not made nor issued for the purposes for which said company was authorized to make or issue its bonds; and your orators refer to the copies of said bond and said mortgage hereto annexed.

And your orators are advised that all the present holders of said bond, are affected with the same notice, and that John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry R. Langhaar, who have been made parties defendant herein at their own request, are holders affected by such notice.

And your orators show that the original bill of complaint in this cause was filed shortly after Frederick P. Dimpfel, complainant herein, had obtained knowledge of the nature of the transaction as hereinbefore set forth between said Schuchardt, Torrance, and Bloodgood, and that your orator, John R. Callaghan, was ignorant of said transaction until long after said bill had been filed in this your honors' court.

CHARLES W. HASSLER,
Solicitor for Complainants.

122 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederick P. Dimpfel, being duly sworn, deposes and says that he is one of the complainants in the above-entitled cause, and that he has read the foregoing amendments to the bill of complaint therein, and knows the contents thereof to be true, except as to the matters therein stated to be alleged upon information and belief, and as to these he believes it to be true.

F. P. DIMPFEL.

Subscribed and sworn to before me this 10th day of March, 1880.
JOSEPH GUTMAN, JR.,
United States Commissioner, Southern District of New York.

(Endorsed:) Filed June 19, 1880. J. A. Jones, cl'k.

123 And afterwards, to wit, on said 19th day of June, in the year last aforesaid, came said defendant, by its solicitor, & filed in said clerk's office its answer in said cause, which is in the following words, to wit:

Answer of R. R. Co.

In the circuit court of the United States for the southern district of Illinois, in the seventh circuit.

FREDERICK P. DIMPFEL ET AL., COMPLAINANTS,
against
THE OHIO & MISSISSIPPI RAILWAY COMPANY et al., defendants.
} In equity.

The answer of the said Ohio and Mississippi Railway Company, one of the defendants, to the amended bill of the said Frederick P. Dimpfel and others, complainants.

This respondent, for answer to the amended bill of the said complainant, says: That it admits the allegations of said amended bill, as set forth in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth clauses thereof to be substantially true, except the allegation in said seventh clause, that some of the bonds issued under the mortgage in that clause named are yet held in trust to be exchanged for bonds previously issued, as to which it says all of said bonds have been issued and are now outstanding; and except also the allegation in said seventh clause
124 that the vacancy occasioned by the death of said Samuel U. F. Odell has not been filled, as to which this respondent says that one Robert Garrett, of the city of Baltimore, in the State of Maryland, has been duly selected as trustee in place of the said Odell, deceased.

The respondent, further answering as to the said tenth clause, and as to the eleventh, twelfth, thirteenth, fourteenth, and fifteenth clauses of said amended bill, says that on the 9th day of September, 1874, the said Daniel Torrance, who was then president of the said Ohio and Mississippi Railway Company, without the knowledge of the board of directors of said company, entered into an agreement in writing of that date with Messrs. John Bloodgood & Co. and others, by which it was admitted and understood between the said D. Torrance, president of the Ohio and Mississippi Railway Company, party of the first part, and the said Messrs. John Bloodgood & Co., and Messrs. F. Schuchardt & Sons, for themselves and other parties holding first-mortgage bonds of the said Springfield and Illinois Southeastern Railway Company, who might choose to join in the said agreement, parties of the second part, as follows:

That the said parties of the second part would at the sale to take place under a decree of the United States circuit court, at Springfield, Illinois, dated July 3, 1874, of the property and franchises of the said Springfield and Illinois Southeastern Railway Company, cause a bid to be made for said property of one million of dollars, or would purchase the same for the account of the bondholders for a sum less than a million of dollars, in accordance with the terms of said decree, and would take the title to the same in the name of M. H. Bloodgood. The said M. H. Bloodgood to hold the title until the parties of the first part should deliver to the parties of the second part seventeen hundred and fifty bonds for one thousand dollars each, legally executed by the Ohio and Mississippi Railway Company, with semi-annual coupons at the rate of seven per cent.

per annum, secured by a first mortgage on the property so purchased, and then the title should be transferred to the Ohio and Mississippi Railway Company. The parties of the second part were to pay off all legal
125 liens which might be decided to be a prior claim, or to take precedence of the title so conveyed. To enable the parties of the second part to make the purchase, and aid them in paying off all bondholders who might refuse to join them, or any other legal liens upon the property, the party of the first part would deposit with the parties of the second part three hundred thousand dollars of the debenture sinking-fund bonds of the Ohio and Mississippi Railway Company, to be returned to the party of the first part when the seventeen hundred and fifty bonds theretofore agreed to be delivered should be delivered to the said parties of the said second part. And it was understood that the Ohio and Mississippi Railway Company should have a right to include in said mortgage a total of three million of dollars of bonds including the seventeen hundred and fifty therein recited.

All coupons maturing within two years after date of delivery of said property to the purchaser, with a clear and perfect title to same, were to be funded into the said first-mortgage bonds upon the said property so purchased at par, if so desired by the party of the first part.

And the said D. Torrance signed the said agreement with reserve, subject to the ratification of the board of directors of the said Ohio and Mississippi Railway Company.

And this respondent avers that the sale and conveyance to said M. Hildreth Bloodgood, mentioned in said tenth clause of said amended bill of complaint, was made in pursuance of the agreement and understanding aforesaid.

That afterward, on the 7th day of December, 1874, at a meeting of the executive and finance committee of said Ohio and Mississippi Railway Company, composed of said Daniel Torrance, Frederick Schuchardt, and Sir Alexander T. Galt (who were also at that time members of the then board of directors), held on said day, in the city of New York, the said agreement was submitted to, and approved by, said meeting, and said Torrance directed to take the necessary steps for carrying out said
126 agreement subject to said modifications, as circumstances might require.

And thereupon such modifications were afterward made of said agreement and understanding, to the effect that the said M. Hildreth Bloodgood should convey the said railroad and other property to the said Frederick Schuchardt and John Bloodgood, who should then with their wives respectively convey the same to said Daniel Torrance, and that he and his said wife, Sophia J. Torrance, should then convey said railroad and other property to the said Ohio and Mississippi Railway Company, which company should at the same time issue, or prepare for issue, its bonds to the aggregate amount of $3,000,000—first, in bonds of $10,000 each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, at the times and in the manner as stated in the supposed mortgage exhibited with and made part of said amended bill, the same to be secured by a mortgage upon said railroad and other property so proposed to be purchased, executed by said Ohio and Mississippi Railway Company, and also by the said Torrance and wife, to the said Farmers' Loan and

Trust Company, as trustee, and that the said John Bloodgood, M. Hildreth Bloodgood, Frederick Schuchardt, and their associates, should receive as and in full of the consideration of said sale and conveyance of said railroad and other property to said railway company, one hundred and seventy-five of said bonds for $10,000 each, amounting in the aggregate to $1,750.000, with the privilege of substituting therefor coupon bonds for $1,000 each, bearing the same rate of interest, and as described in said Exhibit C, annexed to said amended bill; and that the interest on said bonds, so to be given as the consideration aforesaid, for two years might be funded in bonds of the same issue, it being understood and agreed that all claims for taxes, and all liens of every sort on such property were to be discharged by said vendors, and a perfect and clear title made to said Ohio and Mississippi Railway Company for the said road and property so attempted to be purchased; and it was further agreed that $300,000 of said
127 bonds should be retained out of said $1,750,000, as a security for the discharge of said liens and taxes, and for making such clear title; and that the residue of said $3,000,000 of bonds should be held and issued by said Ohio & Mississippi Railway Company, to improve its said line of railroad and to increase the equipment thereof, and for other purposes connected with the business of said Ohio and Mississippi Railway Company. And this respondent avers that the consideration for said sale and conveyance was to be paid only in said bonds, and in the manner aforesaid; and this respondent avers, and so charges the fact to be, that the several conveyances mentioned in the eleventh, twelfth, thirteenth, and fourteenth clauses of said amended bill were made and delivered in execution of the agreement so made as aforesaid, and not otherwise.

This respondent avers that the said Daniel Torrance negotiated said purchase on the terms aforesaid without any authority from the board of directors or from the stockholders of said company to make the same, and that the said conveyances, and said bonds, and the said mortgage were so made and executed without the authority of said directors and stockholders, as was then required by the laws of the State of Illinois, where said railroad and other property are situate.

That afterward, at a special meeting of the board of directors of said Ohio and Mississippi Railway Company, held in the city of New York, on the 13th day of March, 1875, the said Torrance made known to said meeting the terms of said contract and understanding, and that the same had been carried out, and said conveyances recorded; that the bonds which were to be given in payment had been executed and delivered, and that the company had entered into the occupation of said purchased property on March 1, 1875; and his action in that behalf was, by a resolution of said meeting so held, approved and confirmed; and afterward, at the regular meeting of the board of directors of said company, held in the city of Cincinnati, Ohio, on the 13th day of October, 1875, the
128 said action of said special meeting held, as aforesaid, in the city of New York, was approved, ratified, and confirmed; and afterward, at the annual meeting of the bondholders and stockholders of the said Ohio and Mississippi Railway Company, held at the office of said company, in Cincinnati, Ohio, on the 14th day of October, 1875, the following resolution was offered and unanimously adopted, namely: "Resolved, that the action of the president and board of directors in carrying out the contracts

for the purchase of the Springfield and Illinois Southeastern Railway, with the equipment and franchises accompanying the same, and particularly the execution and delivery of the mortgage for three millions of dollars to the Farmers' Loan and Trust Company of New York, dated January 30, 1875, on the property and franchises so purchased and heretofore belonging to the Springfield and Illinois Southeastern Railway Company, be, and the same is hereby, ratified and confirmed."

That the whole number of votes represented in person or by proxy at said meeting was 136,054, made up of the votes of both stockholders and mortgage bondholders—stockholders being entitled to one vote for each share of stock of the par value of one hundred dollars, and mortgage bondholders being entitled to one vote for each one hundred dollars of the amount of bonds held by them. That not more than 116,282 shares of the capital stock of said company, out of 240,000 shares then issued and outstanding, were voted at said meeting for any purpose whatever, the residue of the votes represented at said meeting being those of mortgage bondholders. That no vote was taken by shares upon said resolution, nor any record kept of any such vote, except the record of the passage of the resolution aforesaid.

That the only notice given of such meeting was by publication, in the cities of New York and Cincinnati, to the effect that the "Annual meeting of bondholders and stockholders of the Ohio and Mississippi Railway Company, for the election of three directors to fill vacancies, and other business, would be held at 217 West Fourth street, Cincinnati,
129 Ohio, Thursday, October 14, 1875, at ten o'clock a. m., and that the transfer-book would be closed from September 18th until ten o'clock a. m., October 18th next."

That the first publication of this notice was made on September 16, 1875, and was continued in five successive weekly publications, the last publication being on October 14, 1875.

That out of the said 116,282 shares of stock voted at said meeting, over 116,200 shares were voted by persons acting as proxies or attorneys in fact, under powers of attorney, none of which specified the right to vote upon any such resolution of ratification, or for the making of said bonds and mortgage, or any other matter or thing relating to the purchase of said Springfield and Illinois Southeastern Railway and other property aforesaid.

And the respondent avers that the concurrence of two-thirds in amount of the owners of its capital stock, or any other number of such owners, in the creation of the debt aforesaid, and the execution of the mortgage aforesaid, was not, at any time, made manifest by the votes cast by such stockholders, in person or by proxy, on the passage of any order or resolution, at a meeting of the stockholders of said corporation, called by the directors for such purpose; nor did said directors give notice of such meeting by causing written or printed notices thereof to be either personally served upon or duly mailed to such stockholders, whose names and address were known to said directors, for sixty days before the term of such meeting, or any other time, in which notices the time and place of such meeting, and the purpose thereof, and the amount of said proposed indebtedness, were stated; nor were like notices caused to be inserted in any newspaper published in each county through which the said Springfield and Illinois South-

eastern Railway then ran, or through which the said respondent's road ran in said State, for the period of sixty days prior to a day appointed for such meeting, or for any other period; nor was any resolution or order authorizing the creation of such indebtedness, and the execution of said
130 mortgage to secure the same, together with the result of the vote thereon, recorded in the office of the recorder of deeds of each or any of said counties through which said road ran, nor in the office of the secretary of state of said State of Illinois; all of which was required by the laws of said State then and now in force.

This respondent further represents that the possession of the said Springfield and Illinois Southeastern Railway, and other property so attempted to be purchased as aforesaid, was delivered to the said Daniel Torrance and by him placed in the possession of this respondent, on or about March 1, 1875, and that it held and operated the same as its Springfield Division until the 17th day of November, 1876, when the same was taken from the respondent's possession and placed in the hands of said receiver, as stated in said amended bill of complaint.

This respondent further represents that the said Torrance delivered to the said John Bloodgood and Frederick Schuchardt, as trustees for themselves and their associates, bonds purporting to be issued under the supposed mortgage hereinbefore named, to the amount of $1,750,000, on the face thereof, less $300,000 reserved as aforesaid, for the purpose aforesaid (the greater part of which $300,000 has since been delivered to them), and also made further deliveries to them as and for interest on said $1,750,000, of a large amount of said bonds, so that they have received for themselves and their associates an aggregate sum of about $1,961,000 of said bonds, leaving in the hands of said respondent, or under hypothecation and subject to its control, about $1,039,000 of said bonds (of which a part may have been some of the $300,000 retained as security as aforesaid), up to the time of the appointment of receivers, as stated in said amended bill of complaint, and which then came into the custody and control of the court in the said cause in which said receivers were appointed.

This respondent, further answering, says that it is advised by counsel, and it so avers upon such advice, that all the acts of the said Torrance, purporting to be done as president of said Ohio and Mississippi Railway Company, and of said executive and finance committee, and of said
131 directors, and of said stockholders and mortgage bondholders, purporting to be done in the name and behalf of this respondent, are void in law and of none effect, because this respondent never had any lawful power or right to make the purchase of said Springfield and Southeastern Railway, nor to issue the said $3,000,000 of bonds, and secure the payment thereof by a mortgage upon the said railway, nor to apply the said $1,961,000, or any other part of such bonds, to paying for said road, nor to use or issue the remainder thereof, and because said supposed purchase and the making of said mortgage and of said bonds purporting to be secured thereby, have not at any time been authorized as required by the laws of said State of Illinois, where said property is situate.

This respondent, further answering, states, upon information and belief, that a large majority of its stockholders were not advised of the said transactions of its said president, or of said directors, nor of the said attempt to ratify and confirm the same, at the said stockholders' meeting

held on October 14, 1875, at the time the same occurred, nor until after the appointment of said receivers in November, 1876, as stated in said amended bill of complaint, and that said supposed purchase and the other transactions aforesaid have not been acquiesced in by said stockholders with knowledge of the facts so as to bind them, or so as to bind this respondent in equity.

This respondent further states, on information and belief, that the said John Bloodgood, M. Hildreth Bloodgood, and John Bloodgood & Co., and the said Frederick Schuchardt & Sons, or their estate now being liquidated in insolvency, hold a majority in amount of said bonds, and they and the said Charles Dellinger, Henry L. Langhaar, and all other holders of said bonds, as well as the Farmers' Loan and Trust Company, had, as respondent is informed and so charges the fact to be, at the time of said several transactions, and still have, full notice of the want of legal power and right in this respondent to engage in the same, and of
132 all the facts and circumstances aforesaid touching said supposed purchase and the method of paying therefor.

This respondent further says that during the time it so held possession of said Springfield and Illinois Southeastern Railway and other property, to wit, in the year 1875, it constructed six and two-thirds ($6\frac{2}{3}$) miles of railroad from Pana, in Christian County, Illinois, to Tower Hill, in Shelby County, in said State, on the line and as part of said Springfield and Illinois Southeastern Railway, at a cost of $73,081.48 in cash, and it has expended large sums of money in completing the title to the right of way at various points on the line of said railway, in the purchase of depot grounds and yards at Beardstown, Springfield, Tower Hill, Shawneetown, and other points on said line, in the purchase of machinery, and in the maintainance, repair, and operation of said line, in excess of all receipts, earnings, and benefits derived therefrom.

This respondent, further answering, says, as to the allegations of said amended bill of complaint set forth in the 16th to the 22d clauses thereof, both inclusive, it cannot gainsay the same, but supposes the facts there stated to be correct; but as to the said 23d clause, it says that while its present board of directors is in part composed of persons who were members of said board on the 30th day of January, 1875, and at the several periods of the various transactions aforesaid, none of them had at that time any interest in the said Springfield and Illinois Southern Railway, except the said M. Hildreth Bloodgood, Charles A. Beecher, and Frank W. Tracy, none of whom were then directors, and none of them now have any such interest, as this respondent is informed, except the said M. Hildreth Bloodgood.

This respondent, further answering, says that its said board of directors, in view of the fact that grave questions exist as to the legality of the proceedings for the purchase of said Springfield and Illinois Southeastern Railway and the property connected therewith, and as to the legal power of the respondent to make such purchase, as well as to the legality
133 of the bonds issued by this respondent, and of the mortgage upon the said railway and other property, executed to secure the payment of said bonds, and that such questions are pending in this case, have instructed its president to file the answer of this respondent in said cause, and to set up the said want of power to make said purchase, and the ille-

gality of the same, and of the proceedings connected therewith, including the giving of said mortgage and the issuing of bonds thereunder; and to offer to surrender and restore said railroad and property to the said M. Hildreth Bloodgood and John Bloodgood and their associates, and to account for the earnings and profits thereof, subject to a statement of an account for moneys expended upon and in respect to said railroad and other property upon principles of equity, and to pray for the rescission of said sale, and for the statement of an account of earnings, profits, and expenditures as may be equitable, and to take all proper steps to make such defense good in law, in this court, or by appeal or writ of error to any higher court, as he may deem expedient, and as he may be advised by counsel, or to test the question of the legality of said purchase and proceedings, by cross-bill or by original proceedings for that purpose, if counsel shall so advise, and also to present said question by way of defense in any legal proceedings against the respondent now or hereafter pending in any court whatsoever, and generally to do and perform whatever may be necessary in that behalf.

This respondent now offers to surrender and restore said railroad and other property to its proper owners in equity, as may be determined and directed by this court, and to account for the profits and earnings thereof, subject to the stating of an account of the same, and of the moneys expended upon or on account of said railroad and other property, upon principles of equity, and to make good to such equitable owners all that this respondent obtained by the possession and occupancy aforesaid.

And this respondent prays the same relief as is asked for by the said complainant in his said amended bill; and that, in the event of the allowance of such relief, an account may be taken and stated upon prin-
134 ciples of equity, before a master of this court, or otherwise as the court may direct, between the respondent and the equitable owners of said railroad and other property, of the earnings and profits received, and of the money expended in the operation and maintenance of said road and property, or otherwise on account thereof. And further, that in the event the title to said railroad and other property may be found to be in the said Daniel Torrance, and subject to said mortgage deed as executed by him and his wife as individuals, such further order and decree may be made in that regard as may be equitable and proper.

The respondent further prays that this answer may be taken in the nature of a cross-bill as against the complainant and its codefendants in this cause, and that it may have such other and further or different relief in the premises as to the court may seem meet and just, and in accordance with the rules of the court, etc.

Witness the seal of said corporation and its signature, hereto affixed by its president.

THE OHIO & MISSISSIPPI
RAILWAY COMPANY,
[SEAL.] By W. T. McCLINTICK,
President.

CHARLES A. BEECHER,
Solicitor for Respondent.

CHARLES A. BEECHER,
ROBINSON, KNAPP & SHUTT,
Of Counsel.

135 UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

William T. McClintick, being duly sworn, deposes and says that he is the president of the Ohio and Mississippi Railway Company, the respondent in the foregoing named answer; that he has read the said answer, and knows the matters of fact therein alleged to be true, except as to the matters of fact therein stated which are alleged to be upon information and belief, and as to those he believes the same to be true.

Subscribed and sworn to before me this day of January, A. D. 1880, as witness my hand and seal of office.

(Endorsed:) Filed June 19, 1880. J. A. Jones, cl'k.

136 And now, afterwards, to wit, on Saturday, the said 19th day of June, at the June term of said court, in the year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Decree.

FREDERICK P. DIMPFEL AND JOHN R. CALLAGHAN
vs.
OHIO AND MISSISSIPPI RAILWAY COMPANY, Daniel Torrance, Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, and The Farmers' Loan and Trust Company. } In chancery.

A demurrer to the bill in this case having been heretofore sustained by the court, the plaintiff now moves the court for leave to file an amended bill in place of the original bill, and an amendment to said amended bill, said amended bill and the amendment thereto being marked "A, June 19, 1880," and "B, June 19, 1880," respectively, and the plaintiff also
137 moves that leave be given to make John R. Callaghan a party plaintiff herein, as of the date of the 21st of December, 1878, in conformity with his petition herein.

And at the same time the Ohio and Mississippi Railway Company moves that leave be given to file its answer in conformity with the affidavit herein filed; all of which motions are hereby granted by the court, and the said amended bill, the amendment thereto, and the said answer are accordingly filed in court.

And the parties defendants, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar, who have heretofore filed a demurrer to the original bill as amended October 28th, 1878, hereby renew the said demurrer, and move the court that it may be considered as filed to the amended bill and the amendment thereto, which last motion is allowed, and thereupon, by agreement of the parties thereto, the said demurrer is submitted to the court for its decision thereon, and the court being sufficiently advised as to the said demurrer to the amended bill and the amendment thereto sustaining the same, and the plaintiffs electing to abide by the demurrer and declining further to amend the
138 said bill, the said bill, as amended, is hereby dismissed with costs, and the said plaintiffs except to the opinion of the court and pray an ap-

peal to the Supreme Court of the United States, which is allowed upon their giving bond according to law. The order of the court in this case is made without prejudice to the right of the Ohio and Mississippi Railway Company, if it shall be so advised, to institute suit in any court having jurisdiction thereof to enforce any equities claimed in its answer herein.

Correct: Enter June 19, '80.

T. D.

And afterwards, to wit, on the 10th day of July, in the year last aforesaid, came said complainants, by their solicitor, and filed in said clerk's office their appeal bond in said cause, which is in the following words, to wit:

139 *Appeal bond.*

U. S. circuit court, southern district of Illinois.

FREDERICK P. DIMPFEL, COMPLAINANT,
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY, Daniel Torrance, Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, The Farmers' Loan and Trust Company, defendants. } In equity.

Know all men by these presents that we, George L. Brown and Belden B. Brown, both residing in the city of Brooklyn, in the county of Kings and State of New York, and being citizens of said State of New York, are held and firmly bound unto the Ohio and Mississippi Railway Company, Daniel Torrance, Sophia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, and The Farmers' Loan and Trust Company in the sum of five hundred dollars, lawful money of the United States, to be paid to the said appellees, their successors, execu-
140 tors, administrators, or assigns, for which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals; dated this second day of July, A. D. one thousand eight hundred and eighty.

Whereas the above-named Frederick P. Dimpfel and John R. Callaghan have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States in and for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above named Frederick P. Dimpfel and John R. Callaghan shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their appeal, then this obligation to be void; otherwise to remain in full force and virtue.

GEO. L. BROWN. [L. S.]
BELDEL B. BROWN. [L. S.]

Signed, sealed, & delivered in the presence of—as to Belden B. Brown & Geo. L. Brown—
EDWARD L. OWEN.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

141 On this second day of July, one thousand eight hundred and eighty, before me appeared Belden B. Brown, known to me to be the same person described in and who executed the foregoing bond and acknowledged to me that he executed the same.

[L. S.] EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Belden B. Brown, being duly sworn, doth depose and say that he is a householder in the city of Brooklyn, New York, residing in said city, and that he is worth the sum of one thousand dollars over and above all his liabilities, exclusive of property exempt from execution.

BELDEN B. BROWN.

Sworn to before me this 2d day of July, 1880.

[L. S.] EDWARD L. OWEN.
U. S. Commissioner for the Southern Dist. of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

142 On this sixth day of July, one thousand eight hundred and eighty, appeared George L. Brown, known to me to be the same person described in and who executed the foregoing bond and acknowledged to me that he executed the same.

[L. S.] EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

George L. Brown, being duly sworn, doth depose and say that he is a householder in the city of Brooklyn, New York, residing in said city, and that he is worth the sum of one thousand dollars over and above all his liabilities, exclusive of property exempt from execution.

GEO. L. BROWN.

Sworn to before me this 6th day of July, 1880.

[L. S.] EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

143 I certify that the sureties above named are known to me to be abundantly responsible for the amount specified in said bond or obligation.

[L. S.] EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

(Endorsed:)
Bond approved July 9, '80.

THOMAS DRUMMOND.

(Also endorsed:) Filed July 10th, 1880. J. A. Jones, clerk.

144 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States in and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause wherein Frederick P. Dimpfel and John R. Callaghan are complainants, and the Ohio and Mississippi Railway Company, Daniel Torrance, Lydia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, and the Farmers' Loan and Trust Company are defendants, as fully and completely the same appear of file and of record in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

[SEAL.] J. A. JONES, *Clerk.*

145 UNITED STATES OF AMERICA,
Southern District of Illinois:

To the Ohio and Mississippi Railway Company, Daniel Torrance, Lydia J. Torrance, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, Henry L. Langhaar, The Farmers' Loan and Trust Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1880, pursuant to an allowance of appeal filed in the clerk's office of the circuit court of the United States in and for the southern district of Illinois, wherein Frederick Dimpfel and John R. Callaghan are appellants, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Thomas Drummond, judge of the circuit court
146 in and for said district, this ninth day July, in the year of our Lord one thousand eight hundred and eighty.

THOMAS DRUMMOND.

Executed this writ on the 16 day of July, 1880, by reading the same and delivering a true copy thereof to Frank W. Tracy, one of the directors of the Ohio and Mississippi Railway Company, the president of said company not found in my district.

JACOB WHEELER, *U. S. Mar.*,
By S. T. DRESSER, *Deputy.*

Service, $2; copy, .30—2.30.

(Indorsed:) U. S. circuit court, southern district Illinois. Frederick P. Dimpfel vs. The Ohio & Mississippi Railway Company et al. Citation. Charles W. Hassler, sol'r for compl't.

(Indorsement on cover:) No. 135. Frederick P. Dimpfel and John R. Callaghan, appellants, vs. The Ohio and Mississippi Railroad Company, Daniel Torrance et al. S. Illinois C. C. U. S. Filed 16th October, 1880.

110-209

FILED
NOV 13 1883
JAMES H. McKENNEY, CLERK

No. 135.

United States Supreme Court,

OCTOBER TERM, 1883.

FREDERICK P. DIMPFEL, and
JOHN R. CALLAGHAN,
Appellants,

vs.

THE OHIO & MISSISSIPPI RAILWAY CO., THE FARMERS LOAN & TRUST CO., JOHN BLOODGOOD, *et al*,

Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF FOR APPELLANTS.

CHARLES W. HASSLER,
Counsel.

In the United States Supreme Court.

OCTOBER TERM, 1883.

No. 135.

FREDERICK P. DIMPFEL and JOHN R. CALLAGHAN,
Appellants,

vs.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, DANIEL TORRANCE, JOHN BLOODGOOD, *et al.*,
Appellees.

BRIEF FOR APPELLANTS.

Appellants, stockholders of defendant railway company, filed their bill in the Circuit Court, for the Southern District of Illinois, praying the Court to set aside a certain deed of conveyance and a certain trust deed purporting to have been legally executed by the said defendant. The railway company's answer asked the same relief. Certain holders of bonds issued under the trust deed, having, at their own request, been made defendants filed a demurrer in which the trustee joined. The demurrer was sustained and the bill dismissed. Plaintiffs appealed to this Court.

The facts are admitted by the demurrer.

STATEMENT OF FACTS.

On the 12th February, 1851, the Legislature of the State of Illinois granted a charter to the Ohio & Mississippi Railroad Company, authorizing that company to locate, finish, perfect and maintain "a railroad with one or more tracks commencing at Illinoistown, on the Mississippi River, in the County of St. Clair, and running thence on the most eligible route to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana," and with the usual power of railroad companies as to transportations of passengers and freight. (Act, Sec. 2, *post*, page 101.)

And it was specially provided that "the railroad constructed under this act of incorporation *shall be confined* within ten miles on either side of the Great Western Mail route from St. Louis to Vincennes." (Act, Sec. 19, *post*, page 108.)

The company was authorized "to borrow such sums of money as may be necessary for completing or finishing or operating their *said* railroad." (Act, Sec. 16, *post*, page 107.)

By an amendment of 22d June, 1852, authority was given to borrow money "for the sole purpose of constructing *said* road * * * and to secure the payment thereof * * * may mortgage their corporate property or franchises, or convey the same by deed of trust for said purposes." (Act, Sec. 1, *post*, page 109.)

By a further amendment, dated 27th February, 1854, authority was given "to extend their railroad by one or more tracks from Illinoistown to the Mississippi River, within one thousand yards of the northern and southern limits of said town." (Act, Sec. 1, *post*, page 111.)

On the 1st July, 1852, a mortgage was executed to secure bonds to the amount of $8,500,000, and on the 1st January, 1854, a second mortgage was executed to secure bonds amounting to $1,500,000. All the bonds of both classes were issued, and default having been made in payment of interest on those secured by the

second mortgage, a decree of foreclosure was entered by the U. S. Circuit Court for the Southern District of Illinois, at the March term, 1862, directing a sale of the property covered by the second mortgage, and subject to the first mortgage (see *post*, page 115).

In the meantime, on the 5th February, 1861, the Illinois Legislature passed an Act to incorporate certain persons as the Ohio and Mississippi Rail*way* Company, "for the purpose of purchasing and taking a conveyance of all the railway property, real and personal, rights and franchises of the Ohio and Mississippi Rail*road* Company, incorporated by the Act of the General Assembly of this State, entitled "An Act to incorporate the Ohio and Mississippi Railroad Company," approved February 12th, 1851 (Act, Sec. 1, *post*, page 113). This act gave the rail*way* company "all the power and privileges conferred on the rail*road* company" (Sec. 3, *post*, page 114.)

At foreclosure sale, the 2d June, 1862, the Ohio and Mississippi Rail*way* Company became the purchaser of the property of the rail*road* company, subject to the first mortgage executed by that company. This sale was confirmed, and the rail*way* company became the successor of the rail*road* company (decree, *post*, page 116).

On the 18th December, 1867, a consolidation was affected between the Ohio and Mississippi Railway Company of Illinois, and a consolidated company of Ohio and Indiana bearing the same name, and on the 2d of the same month, the consolidated company of Illinois, Indiana and Ohio executed a mortgage to secure consolidated bonds, not to exceed $6,000,000, and on the 29th March, 1871, a further mortgage was executed to secure $4,000,000 of second mortgage bonds.

30th March,1869, the Legislature of Illinois authorized the building of a "branch railroad between Caseyville and East St. Louis, in St. Clair County." (Act, Sec. 1, *post*, page 119.)

On the 21st January, 1870, the Springfield and Illi-

nois Southeastern Railway Company was a consolidate corporation of Illinois, owning a line of railroad in process of construction from Shawneetown, on the Ohio River, to Beardstown, on the Illinois River, and intersecting the Ohio and Mississippi Railway Company's line of road at Pana, and on that date it executed a mortgage for $3,400,000 to secure bonds to that amount. The majority of these bonds came into the ownership of John Bloodgood & Co., a copartnership consisting of John Bloodgood and M. Hildreth Bloodgood, and Frederick Schuchardt & Co. (*Record*, pages 8, 41.)

Default having been made in the payment of interest, a foreclosure sale took place on 15th September, 1874, and the property was purchased by M. Hildreth Bloodgood for the nominal sum of $500,000, but the fact is $40,000 was paid in cash, and $3,000,000 in the bonds and overdue coupons. A decree of Court, dated 18th January, 1875, confirmed this sale and directed the railway company to unite in the deed of conveyance, and the company did so unite by Charles A. Beecher, its then vice-president signing the deed. (*Record*, pages 8, 42.)

28th January, 1875, for $500,000, "lawful money," M. Hildreth Bloodgood granted, sold and assigned by deed of conveyance all the property purchased by him to Frederick Schuchardt and John Bloodgood. (*Record*, pages 8, 42.)

Frederick Schuchardt had become largely interested in the Springfield and Illinois Southeastern Railway bonds. (*Record*, pages 48–50.)

29th January, 1875, for $1,750,000, "lawful money," Frederick Schuchardt and wife, and John Bloodgood and wife, granted, sold and assigned by deed of conveyance the same property to Daniel Torrance. (*Record*, pages 9, 42.)

30th January, 1875, for $1,750,000, "lawful money," Daniel Torrance and wife, executed a deed conveying the same property to the Ohio and Mississippi Railway Company.

0th January, 1875, the Ohio and Mississippi Railway

Company purported to execute its mortgage trust deed to the Farmers' Loan and Trust Company to secure an issue of bonds to the amount of $3,000,000. This deed of trust conveyed to the trustee the same property as was the subject of the preceding deeds of conveyance, and was signed by Daniel Torrance, as president of the railway company, and by Daniel Torrance and his wife, "in assurance and confirmation of the same," and providing that neither of them did "assume any personal liability for the payment of any of" the bonds which might be issued thereunder. (*Record*, pages 43, 56.)

In fact the $1,750,000," lawful money,"the consideration named in the deed executed by Schuchardt & Bloodgood, and their wives to Torrance, and in the deed executed by Torrance and wife to the railway company, was not the real consideration, but $1,995,000 of the bonds subsequently issued by the railway company were the consideration,and $1,000,000 bonds of the same issue were reserved to complete "the six miles from Pana to Tower Hill," of the roadway of the Springfield & Illinois Southeastern Railway, and for repair and improvements on said line, and no "lawful money" passed between the parties to the deed of conveyance of 30th January, 1875, but merely bonds subsequently issued. (Record, page 49, 68.)

Torrance borrowed money upon the bonds retained by him, and large amounts were used in "completing the title to the right of way at various points on the line of said railway, in the purchase of depot grounds and yards at Beardstown, Springfield, Tower Hill, Shawnee Town and other points on said line, in the purchase of machinery, and in the maintainance, repair and operation of said line, in excess of all receipts, earnings and benefits derived therefrom." (*Record*, page 68.)

The payee named in the bonds was Frederick Schuchardt. (*Record*, page 58.)

Coupons for two years were detached from the $1,995-000. (*Record*, page 49.)

On the 28th, 29th and 30th January, 1875, Frederick Schuchardt and Daniel Torrance were directors of the Ohio and Mississippi Railway Company, and were two

of the three members of the Executive and Finance Committee, and Daniel Torrance was chairman of that Committee and president of the company. (*Record*, pages 44, 94.)

Torrance was cognizant of the transactions of Schuchardt and Bloodgood, (*Record*, page 60), and without the knowledge or authority of the Board of Directors of the defendant, had entered into an agreement in writing on the 9th September, 1874, with them for the purchase of the Illinois and Springfield Southeastern Railway, promising to pay for the same by an issue of bonds of the Ohio and Mississippi Railway Company (Record, pages 61, 64, 65), of which he was the president, and which *suo volunte* he immediately proceeded to issue, and did issue, and long subsequently informed the directors that he had issued.

7th December,1874,Torrance and Schuchardt, together with Galt, the other member of the Executive Committee, purported to hold a meeting of the said Committee, and they then approved of the agreement signed on the 9th September, by Torrance, and by Schuchardt and Bloodgood. (*Record*, pages 63, 64.)

13th March, 1875, Torrance made known to a meeting of the Board of Directors, the agreement of 9th September, 1874; the deed of 30th of January, 1875, and that under his directions the company had entered into the occupation of the property on 1st March, past. (*Record*, page 64.)

14th October, 1875, a meeting of the stockholders was held in Ohio, at which only 116,282 shares of stock out of a total of 240,000, while a two-thirds vote was necessary to a vote of approval, were present; and a resolution was declared passed, approving of the so-called purchase and the issue of bonds, but no vote was taken by sharers whatever at the meeting, and no record kept of any such vote except the mere record of the passage of the resolution, and the call for said meeting did not state that any such matter would come before it or be in any way acted upon. (*Record*, page 66.)

On the 17th November, 1876, M. Hildreth Bloodgood

was a director of the railway company (*Record*, page 45), and on that day a bill was filed in the Circuit Court for the District of *Indiana* in the name of William King, a clerk in the office of John & M. Hildreth Bloodgood (who were in fact the owners of the bonds), alleging that he owned $250,000 of the bonds issued under the mortgage of 30th January, 1875, not alleging any default in payment of interest (the coupons from those bonds having been detached for two years), nor any other breach of any condition of the mortgage; but alleging insolvency of the Ohio and Mississippi Railway Company, and praying for a Receiver of the whole of the property of the company, wherever situated. The railway company, by Charles A. Beecher, its attorney, and one of the directors, appeared immediately, admitted the truth of the allegations, and Daniel Torrance and John King, jr., were appointed Receivers as prayed for. (*Record*, page 45.)

Such proceedings were further had in Ohio, Illinois, Missouri, and Kentucky, that the receivers were placed in possession of all the property of the company wherever situated, and of the so-called Springfield Division.

12th September, 1878, the plaintiff, Frederick P. Dimpfel, owner of one thousand shares of stock, filed his bill in the office of the clerk for the Southern District of Illinois.

John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger, and Henry L. Langhaar were, at their own request, made defendants as holders of the Springfield Division Bonds, and they at once filed a demurrer, in which the Trustee joined. The demurrer was brought to a hearing, and an order entered 3d September, 1879, sustaining it.

John R. Callaghan, as owner of five hundred shares of the common stock of the railway company, was on his petition, made a co-plaintiff.

The Ohio and Mississippi Railway Company filed its application to file an answer to the bill of complaint.

This application was signed by William T. McClintick, president of the company, and alleged that the company had not previously filed an answer *because* it had been negotiating with John Bloodgood & Co. in regard to an amicable settlement of disputes and controversies regarding the so-called Springfield Division, *in order that* the property of the company might be released from the litigation in which it had become involved; and further alleging that John Bloodgood & Co. were conducting the defence in this case, and were the real parties in Court, being the owners of said Springfield Division Bonds. (*Record*, page 33.)

19th June, 1880, Dimpfel and Callaghan, by leave of Court, filed their amended and supplemental bill (*Record*, pages 35 and 60), reciting the facts as here set forth, and showing that they were not only not informed in regard to any transactions of the Bloodgoods, Schuchardt and Torrance while such transactions were in progress, but were wholly ignorant of the fact of there having been such transactions, and of the fact that the defendant railway company had in any manner taken possession of the line of road previously controlled by said Bloodgoods and Schuchardt until October, 1876, and subsequently to the filing of the bill of William King, claiming to be the owner of certain bonds issued by the company, and secured upon this last mentioned line of railway. (*Record*, pages 35-62.)

And further showing that not until May, 1878, just previously to the filing of the original bill in this case, did either of the plaintiffs become cognizant in any manner of the nature of these transactions. (*Record*, page 60.)

And on the 20th May, 1878, the plaintiff, Frederick P. Dimpfel, made and sent to the Directors of said company a written protest objecting to any action by the Board of Directors which in any manner might be construed as confirming or legalizing any action theretofore had in regard to obtaining possession of the line of railway formerly known as the Springfield and Illinois Southeastern Railway. (*Record*, page 60.)

And further, that it was not until October, 1879, that

plaintiff became cognizant of the said Schuchardt and Bloodgoods having a large interest in the Southeastern Railway Company's bonds. And alleging further, that the Board of Directors were ignorant of the negotiations until considerable time after 30th January, 1875, and that any action of the Board of Directors and any of the stockholders if any such were had, purporting to ratify such negotiations were not with full knowledge of the facts so as to bind them or the company, but were and are wholly void and of no effect whatever; and that Torrance had executed the mortgage wholly without authority; that Torrance and wife, after having executed a full and complete deed of conveyance, had joined in the mortgage dated 30th January, 1875, being advised thereto by counsel in order that if the transfer to the Ohio and Mississippi Railway Company should at any time be set aside, the property might revert to said Torrance and wife as the lawful owners thereof subject to their mortgage.

And further alleging, that the actions of Torrance in collusion with Schuchardt were in fraud of the rights of the stockholders of the defendant company, and that each of the bonds which were subsequently issued contained notice to all intending owners, that they were not secured upon any property which the defendant company was authorized to own, and that they were not issued for any purpose for which the company was authorized to issue bonds; and that all owners were and are affected by such notice. And further, that the original bill was filed shortly after any of these matters came to the knowledge of the plaintiff, Dimpfel, and that the plaintiff Callaghan was ignorant until long after said bill was filed. (*Record*, page 62.)

Copies of various circulars, the mortgage of 30th January, 1875, and a copy of one of the bonds were annexed to the bill as exhibits. (*Record*, page 58.)

Plaintiffs prayed that the deed of conveyance, the mortgage trust deed and the bonds issued thereunder, all dated 30th January, 1875, might be declared to be void and of no binding effect whatever upon or against the Ohio and Mississippi Railway Company. And for such other or further or different relief as might seem just.

The answer of the railway company, which is in the nature of a cross-bill, admits the facts as to the organization of the railroad and the railway companies, and all the other material facts, and discloses the collusions between Schuchardt and Torrance, while both were members of the Executive and Finance Committee, and gives details of the transactions, and states upon belief, that the stockholders were not advised thereof, nor of any attempt to ratify the same, and that it was not until after the appointment of receivers that the stockholders were aware thereof, and that no such action has been taken relative thereto as to bind them or the respondent. This answer repeats the allegations of the bill, and charges the fact to be, that the Bloodgoods, Dellinger, and Langhaar, and Schuchardt (whose estate was being liquidated in insolvency), as well as the Trustee, had on 30th January, 1875, and prior thereto, and still have, full notice of the want of legal power and right of respondent to engage in the transactions of that date, and knew the circumstances thereof. (*Record*, page 68.)

This answer of the railway company further states that, in view of the fact that grave questions exist as to the legality of the proceedings and its legal power therein, as well as the legality of the bonds, the Board of Directors had caused this answer to be filed setting up these questions, and thereupon offers to surrender and restore said railroad, and to account for the receipts and expenditures. All questions, the answer states, are to be brought before the court by such proceedings as counsel might advise, and it prays for such orders in this case as shall effectuate a re-transfer of the property to Daniel Torrance, and the settlement of all accounts upon principles of equity. (*Record*, page 69.)

The defendants, John Bloodgood, M. Hildreth Bloodgood, Charles Dellinger and Henry L. Langhaar, having renewed their demurrer and moved the Court that it be considered as filed to the amended and supplemental bill, the same was submitted without further argument, and was sustained by the Court and the bill dismissed. (*Record*, page 70.)

This order was made without prejudice to the company to institute suit in any court to enforce any equities claimed in the answer.

The case now comes before this Court upon the appeal of the plaintiffs from the order sustaining the demurrer of four of the defendants and dismissing the bill.

The demurrer sustained, was filed by four of the bondholders, made parties at their own request, and the order dismissing the bill was made, notwithstanding the filing of an answer of the defendant railway company (its answer being in the nature of a cross-bill), asking the same relief as that which should have been granted under the plaintiffs' bill.

Daniel Torrance and wife entered their appearance, but neither answered nor demurred.

ASSIGNMENT OF ERRORS.

The Court below erred in not declaring the acts of Torrance of no binding effect upon the railway company.

The Court below erred in not declaring that the railway company had no power to be or become the owner of the so-called Springfield Division.

The Court below erred in not declaring the so-called Springfield Division bonds to be void and of no binding effect as against the Ohio and Mississippi Railway Company.

The Court below erred in not directing the cause to be referred to a master for an accounting between the railway company and the so-called Springfield Division.

The Court below erred in not declaring the transfer of the so-called Springfield division by Torrance and wife to the Ohio and Mississippi Railway Company to be null and void.

The Court below erred in sustaining the demurrer.

The Court below erred in dismissing the bill.

ARGUMENT FOR APPELLANT.

Plaintiffs claim that—

The acts of Torrance, nominally as president of the company, and the acts of Torrance and Schuchardt, nominally as directors of the company, by which the first as president, and both of them as directors, attempted to bind the corporation, were acts *not* within the power either of Torrance as president or of Torrance and Schuchardt as directors, and the company was not bound by their attempted transfer to it of the Springfield Division, nor by the issue of the bonds which they intended should become a liability of the railway company.

The Ohio and Mississippi Railway Company of Illinois, could exercise only the powers of the Ohio and Mississippi Rail*road* Company, and the constating instruments of the railway company did not authorize the purchase or ownership in any manner of the line of railroad formerly known as the Springfield and Illinois Southeastern.

The Ohio and Mississippi Railway Company could exercise within the State of Illinois only those powers granted by the Legislature of that State, and acquired no further powers within that State, because of the consolidation of the Ohio and Mississippi Railway Company of Illinois with a corporation of the same name of Indiana and Ohio.

The purchase and ownership of the Illinois and Springfield Southeastern Railway being *ultra vires*, and the attempted transfer of it by Torrance to the defendant company not being legal, the transfer should be set aside, the bonds be declared of no binding effect upon the defendant company, and an order entered directing the retransfer of that line of railway, upon a proper settlement of accounts, to Torrance.

This Court is asked to consider—

1. The power of an officer as an agent with limited authority to bind the corporation of which he is an officer.

2. Rules of construction of corporate charters

3. The extra territorial effects of legislative acts.

4. The powers of the Ohio and Mississippi Railway Company in Illinois as derived from the Statutes of that State.

5. The attempted transfer of the Springfield and Illinois Southeastern Railway by Torrance to the Ohio and Mississippi Railway Company.

6. The invalidity of the bonds issued.

7. The doctrine of estoppel does not apply.

8. The attempted transfer and the issue of bonds could not be ratified.

I.

Powers of the President and Directors.

It would be useless for anyone to present an argument before this Court to prove that the authority of an agent of a corporation having limited powers is practically unlimited except by the self-interest of that agent, and that such agent, by his mere will can extend the powers of the corporation *ad libitum;* and yet it would be necessary to prove this very proposition, in order to sustain the acts of Torrance as president, and of Torrance and Schuchardt as directors of the Railway Company, in the matter under consideration.

The laws of agency, as expounded by the courts for many generations, are directly opposed to any such claim, and the laws of agency are as applicable to the acts of a railway president and of railway directors as to the acts of any other class of agents, for the president and directors are not the corporation itself, but are its agents and trustees to execute its corporate behests.

Torrance and Schuchardt were practically the executive committee, but their powers as members of the executive committee did not exceed that of the Board of Directors, out of which such committee was chosen. Sir Alexander T. Galt, a citizen of the Dominion of Canada, was the third member of the committee, but his presence was not necessary to constitute a quorum, and he could not effectually oppose the wishes of the majority of the committee. No charter provision, no statute authority, and no permission of any by-law of the company can be found, which can even be twisted into granting to Torrance and Schuchardt power to make any such purchase as that of the Springfield Division, even conceding, for the moment, that the company itself, by its full and regular corporate action, could make such purchase, much less to issue $3,000,000 of bonds and cause a liability for them to fall upon the company; and yet it was these very things that Torrance and Schuchardt attempted to do. Torrance, as president, was merely the executive officer of the company, and in this transaction he had no corporate orders to execute, Schuchardt was contracting with himself, for himself, and to promote his own individual interests, without regard to the interests of the company of which he was a director. With the charter of the railway company before them, these men attempted to alter the character of the enterprise in which the stockholders had for many years been engaged, by saddling upon the corporation a piece of property which had never paid expenses, as was well known to them, and (see *Record*, pages 48, 49, 50) was set forth in a circular signed by Schuchardt and Bloodgood, and issued subsequent to the supposed transfer to the O. & M. Ry. Co. This circular must have brought rejoicing "To the holders of bonds of the Springfield and Illinois Southeastern Railway Company"—to whom it was addressed—as it showed them (to wit: to Bloodgood and Schuchardt, who were the principal owners,) what a worthless and self-consuming piece of property they, Schuchardt and Bloodgood, had, with the connivance, assent and assistance of Torrance, shifted upon

the shoulders of a proud and solvent corporation, to whom henceforth they (Schuchardt and Bloodgood) could look for interest upon their theretofore unprofitable investment.

And they, this president and this director, further attempted (privately, and for their own purposes,) to increase the capital stock of the corporation of which they were trustees and agents, as well as to increase its bonded indebtedness, by purporting to issue bonds, giving a right to vote to their holders and thus lessening the relative voting power of every share of stock held by every stock holder.

The statute of Illinois (*Post*, page 118), passed on the 7th of May, 1873, contains special provisions in regard to the creation of any bonded debt, and the execution of any mortgage. It was in that act especially provided, that "The concurrence of the holders of at least two-thirds in amount of the capital stock of such corporation in the creation of any such debt, and the execution of any such mortgage" should be made manifest at a meeting to be specially called for that purpose, and, furthermore, that the concurrence of the holders of two-thirds in amount of the stock of such corporation "*shall be necessary to the validity of any such mortgage*," and also, that the resolution authorizing such debt and mortgage shall be recorded in a certain manner, in the offices of the Clerks of the various Counties where the property was situated previous to the issue of any such bonds.

But this president and this director caring not for the laws of Illinois, proceeded to carry out their purpose, against which they had been warned by counsel, that there were strong, valid and legal objections, and having privately carried on their negotiations between themselves, over-ride all the laws of agency, all the laws of trusteeship, and the statutes which gave the corporation being, and Schuchardt and Bloodgood receive from Schuchardt and Torrance, bonds of a solvent corporation for a worthless piece of property. (See *Record*, page 50.)

It is not necessary to occupy the time of this Court

in citing cases to prove the proposition that in the case at bar, neither Torrance nor Schuchardt had any right, power or authority to bind the corporation. It is apparent from the facts as they appear in the Record of this case, that not one of the actors in these transactions can plead innocence, and the bonds having been issued and handed over in the manner shown, a fraud was attempted to be perpetrated upon the plaintiffs and other innocent holders of the stock of the Railroad Company.

But it was claimed by the demurrents in the Court below, that the transfer of their unprofitable property to the defendant Railway Company was not the unauthorized act of the president and director heretofore named, but was the act of the corporation itself, by its agent, who did not exceed its authority; and, further, that even if not originally *intra vires* of the corporation, it had become binding upon the company by subsequent ratifications, and the bonds issued, without any intimation to the stockholders, were liabilities as against their rights.

These propositions appellants deny.

II.

Rules of Construction of Corporate Charters.

It is an elementary principle of the law governing corporations that their powers are restricted to those given in their constating instruments, and such as are necessary for the purpose of carrying into effect the powers expressly granted.

In *Head* v. *Providence Insurance Company*, (2 Cranch, 167,) Chief Justice Marshall says:

"It (the company) may be correctly said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."

In *Perrine* v. *C. and D. Canal Co.*, (9 How., 184) Chief Justice Taney said:

"It is the well-settled doctrine of this Court that a corporation created by Statute is a mere creation of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence."

To the same effect:

Darmouth Col. v. *Woodward*, 4 Wheat, 636.
Bank of Augusta v. *Earl.* 13 Peters, 587.
Bank of U. S. v. *Dandridge*, 12 Wheat, 68.

and State decisions without number, holding that incorporated companies have no powers, but such as are granted or necessarily incidental.

In *Pullan* v. *C. and C. A. L. R. R.*, (4 Biss., 35, 41), Judge McDonald said:

"I recognize the rule that a corporation possesses only those properties which the charter of its creation confers upon it expressly, or as an incident to its very existence."

In *Huntington* v. *Savings Bank*, (96 U. S., 388, 393), Mr. Justice Strong says:

"The rules to be applied to the construction of corporate grants are well-known. A corporation created by Statute can exercise *no powers and has no rights except* such as are *expressly* given or necessarily implied."

In *Caldwell* v. *City of Alton*, (33 Ill., 416), the Supreme Court of Illinois decided that a corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created.

The same was held by the same Court in

Trustee v. *McConnell*, 12 Ill., 140.
McIntire v. *Preston*, 5 Gill, 60.

An incidental power, or one necessary to carry into effect the expressed power, is one that is directly and immediately appropriate to the execution of the specific

power granted, and not one that has a slight or remote relation to it.

Hood v. *N. Y. & N. H. R. R.*, 29 Conn., 1.
Curtiss v. *Leavitt*, 15 N Y., 157.
Beatty v. *Knowler*, 4 Peters, 152.

As corporations are the mere creatures of law established for special purposes, and deriving all their power from the the acts creating them, t is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume and be confined in their operations to the mode and manner and *subject matter* prescribed.

2 *Kent's Com.*, 299.
Dartmouth College v. *Woodward*, 4 Wheat, 518, 636.

"A corporation is in law for civil purposes deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law ; the *latter can do only* what is authorized by its charter."

Railroad Company v. *Harris*, 12 Wall., 65, 81.

A corporation must show its right to act in the manner desired.

Frye v. *Bank of Illinois*, 5 Gillman, 332.

Said the late Judge Breese, (one of the corporators named in the original charter of the O. & M. R. R. of Illinois), in the case of *Petersburgh* v. *Metzker* (21 Ill., 205, 506) :

"The powers of all corporations are limited by the grants in their charter, and *cannot* be extended beyond them."

To the same effect

Illinois College v. *Cooper*, 25 Ill., 148, 151.

Said Lord Langdale, in *Coleman* v. *Eastern Counties Railway* (10 Beav., 1.):

"I am clearly of opinion that the powers which are given by an act of Parliament like that now in question, extend no further than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and work which the act has expressly sanctioned."

and in *East Anglian R.* v. *E. C. R.*, (11 C. B., 803), Lord Chief Justice Jervis says:

"It is clear that the defendants have a limited authority only, and are a corporation *only* for the purpose of making and maintaining *the* railway sanctioned by the act."

So strictly do the English Courts regard this rule that Vice-Chancellor Wigram in *Bugshaw* v. *Eastern Union Railway Company* (7 Hare, 114), says:

"No majority of shareholders, however large, could sanction the misapplication of such portion of the capital. Indeed, in strictness, even unanimity could not make such an act lawful."

And to the same effect, Lord Justice Turner, in *Shrewsbury, etc., Railway* v. *London, etc., Railway*, (22 J. L. Ch., 682); Baron Parke, in *South Yorkshire, etc, Railway Co.* v. *Great Northern Railway Co.*, (9 Ex., 55, 84); and Lord Cranworth, in the House of Lords, in *Eastern Counties Railway* v. *Hawkes*, 35 *Eng. L. & E.*, 8, says:

"It must therefore be now considered as a well settled doctrine that a company incorporated by act of Parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may be."

In *Pearce* v. *M. & I. R. R.* (21 How., 441), this Court cites and approves *Coleman* v. *Eastern Counties Railway*, *ubi supra*, and *East Angelian Railway* v. *Eastern Counties Railway*, *ubi supra*, and the same principle is held in *Zabriskie* v. *C. C. & C. R. R.* (23 How., 391, 398), in which it is said:

"This principle has been constantly affirmed by this Court."

(It is to be noted that the decision in that case is

based upon evidence, satisfactory to the Court, that the corporation had accepted certain acts of the Legislature, and it was, on that account, not permitted to plead the illegality or invalidity of corporate acts authorized by those Statutes.)

"A corporation is strictly limited to the exercise of those powers which are especially conferred upon it. The exercise of the corporate franchises being restrictive of right, cannot be extended beyond the letter and spirit of the act of incorporation."

Beatty v. *Lessee of Knowler*, 4 Peters, 152.

"If you assert that a corporation has certain privileges, *show us the words* of the Legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because *whatever is doubtful is decisively certain against the corporation.*"

Com. v. *E. N. E. R. R.*, 27 Pa. St., 339, 351.

No clause of power or privilege can be inserted in a contract by implication.

Charles River Bridge v. *Warren Bridge*, 11 Peters, 420.

The language of this Court in *Richmond, etc., R. R. Co.* v. *Louisa, etc., R. R. Co.*, (13 Howard, 71), is:

"This act contains the grant of certain privileges by the public to a private corporation, and is a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this: 'That any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public, and the corporation can claim nothing but what is clearly given by the act.'"

"Corporate power can never be created by implication, nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in a manner too plain to be misunderstood. * * * In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

Pa. Railroad Co. v. *Canal Comrs.*, 21 Pa. St., 9.

"Indeed, the uniform language of the English and American Courts is that while all grants of privilege are to be liberally construed in favor of the public, they are to be strictly construed as against the grantee of the monopoly, franchise or charter, and whatever is not unequivocally granted in such acts is taken to be withheld. All acts of incorporation and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies."

Sedgwick on Statutory Law, 292, and cases cited.

In *Newhall* v. *Galena, etc., R. R.*, (14, Ill., 273,) the Supreme Court of Illinois held that the rule of strict construction ought to be applied to railroad charters.

The powers of a corporation cannot be extended by vote of the stockholders. It can only be made by legislative authority.

Hood v. *N. Y. and N. H. R. R.*, 22 *Conn.*, 319.
Anderson v. *Union M. F. Ins. Co.*, 37 *Maine*, 260.
Rollins v. *Clay*, 33 *Maine*, 139.

Incorporated companies are not partnerships, but are to be treated with reference to the objects of their creation and to the express powers with which the Legislature may have invested them, and to that extent the general law of partnership is superseded by the charter.

Purton v. *N. O. and C. R. R.*, 3 La. Ann, 19.

A corporation cannot be constituted by agreement of parties. It can only be created by legislative enactment.

Stowe v. *Flagg*, 72 Ill., 397.

When a corporation is created by public Statute for definite and limited objects, a contract which is en-

tirely unconnected with those purposes is illegal and void

Taylor v. *Chichester, etc., R. Co.*,L. R 2 Ex., 356.
Eastern Co. R. Co. v. *Hawkes*, 5 H. L. C., 331.
East Anglian, etc., v. *Easton Cos. R. Co.*, 11 *C. B.*, 775.
Pearce v. *M. and I. R. R. Co.*, 21 *How.*, 441.

In *Thomas* v. *Railroad Co.* (101 U. S., 71), Mr. Justice Miller refers to the case of The East Anglian Railway Co. v. The Eastern Counties Railway Co. (11 C. B. 775), and after stating the contract in dispute in that case, says that it was held void, as beyond the power conferred by the charter, and cites the words of the Common Bench:

"They cannot engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority."

III.

Extra Territorial Effect of Legislative Acts.

In the course of his oral argument in the Court below, demurrants' counsel laid great stress upon the power conferred upon the Ohio and Mississippi Railway Company

of Ohio and Indiana, by charter granted by these States to corporations of the same name, and by the re-organization laws of those States, as well as by their general railroad laws; and he endeavored to impress the Court with the idea that all powers of the present consolidated corporation which could be lawfully exercised in any State could be equally lawfully exercised in all the three of the States of Ohio, Indiana, and Illinois. The learned judge did not, however, accept these views, and hence the question

What power in Illinois did the consolidated Ohio & Mississippi Railroad Company acquire because of the consolidation with a corporation having certain powers by virtue of the laws of Ohio and Indiana?

is easily answered.

At its last term this Court decided the cases of Clark *v.* Barnard (2 Supreme Court Reporter, 878, 886,887),and Memphis & C. R.R. Co. *v.* Alabama (2 Supreme Court Reporter, 432, 436), in both of which previous decisions were affirmed.

In *Clark* v. *Barnard*, page 887, this Court, speaking through Mr. Associate Justice Matthews, says:

"The question of the powers of the Boston, Hartford and Erie Railroad Company, as a corporation *in* Rhode Island, and of the legal effect of its acts and transactions performed in that State is to be determined *exclusively* by the laws of that State, and not by those of Connecticut, which have no force beyond its own territory."

In *Memphis & C. R.R. Co.* v. *Alabama*, at page 436, this Court, speaking through Mr. Associate Justice Gray, says:

"The defendant being a corporation of the State of Alabama, has *no existence* in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorporated in the State of Tennessee, *must in all its doings within the State of Alabama*, be considered a citizen of Alabama."

These decisions are in consonance with previous decisions of this Court and the U. S. Circuit Courts have invariably followed them.

In *Antelope Co.* v. *C. B. & Q. R.R. Co.* (16 Federal Reporter, 295), Circuit Judge McCrary clearly draws the

distinction between a railway corporation chartered by a State and doing business within it, and a corporation chartered by a State and doing business with another through the ownership "by a sale and transfer" of property in the latter State. On page 297 we read:

"The true rule on this subject is that where the State does not assume by its legislation to create a corporation or to require a foreign corporation to become domestic, but recognizes the existence of such foreign corporation, and its right to come into the State and transact business therein. Such foreign corporation remains a corporation of the State under whose laws it was created."

Bank of Augusta v. *Earle* (13 Peters, 588), was relied on by demurrants, but in that case the Court did not hold that a corporation of one State could exercise the powers in another with permission of the latter—and no claim that the Ohio & Mississippi Railway Company of Ohio and Indiana was, in the transactions under consideration, a corporation of these States, possessing a railroad in Illinois (Ohio *v.* Shearman, 20 O. St. 412), but the fact of the incorporation of the Ohio & Mississippi Railway Company of Illinois was not disputed. The Ohio and Mississippi Railway Company of Indiana, chartered by the Legislature of that State, 14th February, 1848, became by act of the Ohio Legislature of 15th March, 1849, a quasi corporation of the State of Ohio, as was stated by this Court in *Ohio & Mississippi Railroad Company* v. *Wheeler*, 1 Black, 286, in which case Chief Justice Taney said:

"Neither State could confer on it a corporate existence in the other, or add to or diminish the powers there to to be exercised." * * * It has no legal existence in either State, except by law of the State, and neither State could confer on it a corporate existence in the other, nor add to or diminish power to be there exercised."

The corporation referred to by the word "*it*" was this very Ohio and Mississippi Railroad Company.

In *Muller* v. *Dows* (94 U. S. 407) this Court says:

"The laws of Missouri had no operation in Iowa."

and then adds

"It is, however, unnecessary to discuss this subject further."

In *Paul v. Virginia* (8 Wall., 168) this Court held

that extra territorial operation given to local laws "would be 'utterly destructive' of the independence and the harmony of the States."

In *Carroll* v. *East St. Louis* (67 Ill., 568) the Supreme Court of Illinois said:

"All persons in the profession, we presume, will admit that a corporation created by one State cannot exercise its function in another State or sovereignty without permission. This doctrine is announced in Bank of Augusta *v.* Earle (13 Peters, 589); O. & M. R. R. Co. *v.* Wheeler, (1 Black, 297); Ducat *v.* City of Chicago (48 Ills., 172); and Paul *v.* Virginia (8 Wall, 168); and if the proposition were not so fully understood and so firmly established, numerous other cases might be cited confirming the rule."

When Torrance proposed to himself the transactions narrated, he obtained the opinion of counsel in New York, and that opinion is spread out at length on the records of the Ohio and Mississippi Railway Company at its office in Cincinnati. Messrs. Evarts, Southmayd & Choat say:

"If the power granted by the Legislature of Indiana can be considered applicable in the State of Illinois, the power of your company to buy and hold this road and mortgage it in the manner proposed would appear to be clear enough. * * * Whether the Indiana company could, in virtue of its mere Indiana powers, without express permission from the State of Illinois and in the absence of any express prohibition by Illinois laws have been permitted anterior to this consolidation to come into the State of Illinois and buy and hold this branch railroad is a question which must at least be regarded as doubtful, depending, in a great degree, upon questions of comity and public policy, which, as yet, so far as I can ascertain, appear to be not fully settled in Illinois, and if it could not have done so and therefore did not possess the required power the moment of consolidation, I cannot advise that the act of consolidation vested any such power in the consolidate company."

Evidently the learned counsel's attention had not been called to the case of *Carroll* v. *East St. Louis* (67 Ill., 568) which held that although the Connecticut Land Company was chartered by the Legislature of Connecticut with powers to buy and sell and hold real estate *ad libitum* and anywhere, yet the privileges of that company could not be exercised in Illinois. This opinion was based upon the general laws and public policy of the State, but on 30th March, 1875, the Legislature passed an act containing the following:

Provided, that nothing in this act shall be so construed as to authorize any corporation acting by, or organizing under the laws of any other State, to purchase or *otherwise become* the owner of any railroad in this State."

Thompson v. *Waters* (25 Mich., 214) was a case in which the title to certain real estate was in question and while the Court says that the mere right to purchase is not in its nature strictly a franchise, yet the laws of Indiana had no "force or operation (or laws giving powers or creating or enforcing obligations) within the State of Michigan," but in *Carroll* v. *East St. Louis* 67 Ill., 568) the Supreme Court of Illinois expresses its dissent to a foreign corporation holding real estate in Illinois, and in *U. S. Mortgage Co.* v. *Gross*, (11 C. L. N., 331) this principle is re-affirmed.

This, then, is the answer to the question propounded—

The consolidated Ohio and Mississippi Railway Company did not in Illinois acquire additional or other powers because of consolidation with a consolidated corporation of Ohio and Indiana, having additional or other powers than those granted by the Illinois charter.

IV.

Powers of the Ohio and Mississippi Railroad Company of Illinois.

On the 12th of February, 1851, the Legislature of Illinois passed an act incorporating the Ohio and Mississippi Railroad Company, and conferring upon it the power of taking, purchasing, holding, leasing, selling, and conveying estate and property, whether real, personal, or mixed,

"*so far as the same may be necessary for the purposes hereinafter mentioned, and* NO FURTHER."

That the latter words are restrictive cannot be de-

nied. They qualify the "purposes hereinafter mentioned," in the following section, which reads:

SECTION 2. The Ohio and Mississippi Railroad Company shall have full power and authority to locate and from time to time to alter, change, re-locate, construct, re-construct, and fully to finish, perfect and maintain a railroad, with one or more tracks, commencing at Illinoistown, on the Mississippi River, in the County of St. Clair, and running from thence on the most eligible route to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana; and to transport, take and carry property and persons upon said railroad by power of force of steam, or of animals, or of any mechanical or other power, or combination of them, which said company may choose to apply. And for the purposes of constructing *said* railroad * * may take and appropriate to their own use all such lands so designated for the line and construction of *said* road."

But as if the designation of the route as "the most eligible" one between two well-known points might not be sufficiently restrictive of the power of the corporation, the last section (the 19th), especially provided as follows:

"And the railroad constructed under this act of incorporation *shall be confined* within ten miles on either side of the Great Western Mail Route from St. Louis to Vincennes."

Ambiguity is wanting in these words.

There is no hidden, occult, "implied" construction for them, but just their plain English meaning.

The company thus chartered, or the company succeeding to its rights could, in the language in *Perrine* v. *Canal Co.* (9 How., 184),

"exercise no powers except those which the law confers upon it, or which are incident to its existence."

It has

"no powers and has no rights except such as are expressly given or necessarily implied."

Huntington v. *Savings Bank*, 96 U. S., 387, 393.

And

"can do only what is authorized by its charter."

R. R. Co. v. *Harris*, 12 Wall., 65, 81.

"It is clear that the defendants have a limited authority only and

are a corporation *only* for the purpose of making and maintaining *the* railway sanctioned in the act."

East Anglian R. v. *E. C. R.*, 11 C. B., 803.

"If you assert that a corporation has certain privileges, *show us the words* of the Legislature conferring them. *Failing in this*, you give up your claim, *for nothing else can possibly avail you.*

Com. v. *E. Co., R. R. Co.*, 27 Pa. St., 339, 351.

Power was given to the company "*to unite its railroad* with any other railroad."

"SECTION 15. Said Company shall have the power *to unite its* railroad with any other railroad now constructed, or which may hereafter be constructed, either in this state or the state of Indiana, upon such terms as may be mutually ageed upon between the companies so connecting, and for that purpose full power is hereby given to said company to unite and execute such contracts with any other company as will secure the objects of such connection."

It had power to borrow money for a certain definite purpose:

"SEC. 16. Said company is hereby authorized, from time to time, to borrow such sum or sums of money *as may be necessary* for completing or finishing or grading the said railroad, and to issue and dispose of their bonds * * * and to mortgage their corporate property, and franchise, or convey the same by deed of trust to secure the payment of any debt contracted by said company *for the purposes aforesaid.*"

As if this Section 16 of the original charter was not sufficiently specific the first section of the first amendment passed 22d June, 1852, provides that the company

"are hereby authorized to borrow money, from time to time, on the credit of the company, at any rate of interest not exceeding seven per cent. per annum, as may be agreed between the parties, *for the sole purpose of constructing said road, and furnishing* the same with cars, locomotives and other machinery necessary to carry on the operations of *said* company * * * and may issue its corporate bonds *therefor*, * * and may mortgage their corporate property or franchises, or convey the same by deed of trust for *said* purposes."

No impression having then taken possession of any one that the company had power to build any other line than

that named in the charter, nor even any extension, or branch, or division of the same, the Legislature passed an act 27th February, 1854, in amendment of the charter, by which it was provided that the "*company*" might "*extend* their *railroad* over and across Bloody Island."

No powers are given the company to buy, build, own, or operate, or enjoy any other line of railway than that named in these statutes.

The State of Missouri, by its Legislature, gave a recognition of the company by an act approved 23d February, 1853. The preamble recites:

"WHEREAS, The Legislature of the State of Illinois, on the 12th day of February, 1851, passed an act incorporating the Ohio and Mississippi Railroad Company *to construct a railroad from Illinoistown, in the State of Illinois, to Vincennes, in the State of Indiana;*

THEREFORE, there was conferred

"upon said company power to purchase and hold sufficient lands in said city for the use of passenger and freight depots, and for a ferry landing.'"

The company to whom this privilege was conferred was the company chartered to build a line of railroad particularly described in the charter of 12th of February, 1851, *and to none other was it given.*

We hold, then, that the Ohio and Mississippi Railroad Company, of Illinois, had no powers under which it could construct, or purchase, or maintain any other line of railroad than that especially designated in the charter and the amendments thereto, nor could it issue any bonds for any other purpose than to construct and equip its *said* road. The legislative authority to do so was wanting.

We contend, then, that the O. & M. R. R. Co. had no power to build or own any other line of railroad than that specified in the latter act.

The companies organized in each of the three States, Ohio, Indiana and Illinois, soon met with financial diffi-

culties, and foreclosure proceedings were instituted in each of these States.

In Illinois the bill was brought in the name of Henry D. Bacon and others, and such proceedings were had that at the March adjourned term, 1862, a final decree was entered.

In this decree it was duly found that the Ohio and Mississippi Railroad Company was

"A corporation duly created and incorporated by and organized under and in pursuance of the acts" hereinbefore recited, "and with capacity to take, purchase, hold, lease, sell and convey estate and property, real, personal and mixed, *so far as it might be necessary for the purposes* mentioned in said act of incorporation, and to have and exercise all powers, rights, privileges and immunities *which might be necessary to carry into effect the purposes and objects of the said act.*" * * *

"And the Court doth further find that by said incorporating act said company was duly empowered to locate, construct, finish, perfect and maintain a railroad *commencing* at Illinoistown, on the Mississippi river, in the County of St. Clair and State of Illinois, and *running from thence* on the most eligible route to the east line of the State of Illinois, in the direction of Vincennes, in the State of Indiana."

This was the line of railroad the O. & M. R. R. Co. had authority to own.

"And the Court further find that *by said act* of incorporation said Ohio and Mississippi Railroad Company was *authorized*, from time to time, to borrow such sum or sums of money as *might be necessary* for completing and finishing and operating their *said* railroad." * * *

It was further found that, it being necessary for the company

"to avail itself of the charter power conferred upon it to borrow money for constructing, completing and operating *said* road,"

certain bonds were actually issued and disposed of for value.

And thereupon, the order provided that the premises, property and franchises of the company be sold at public auction on the 2d day of June, 1862.

February 5, 1861, the Legislature of Illinois passed an act to incorporate the Ohio and Mississippi Railway Company

It provides that certain persons therein named, and such persons as might be associated with them, were constituted

"a body politic and corporate, by the name and style of the OHIO AND MISSISSIPPI RAILWAY COMPANY, *for the purpose* of purchasing and taking a conveyance of all the railway property, real and personal, rights and franchises of the Ohio and Mississippi Railroad Company, incorporated by the act of the General Assembly of this State, entitled 'An act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes,' approved February 12th, 1851, or any part of said property, rights and franchises, either by private contract or at a judicial sale thereof, which may hereafter take place."

"SECTION 3. The said corporation shall possess all the powers and privileges conferred on the Ohio and Mississippi Railroad Company by the act incorporating the same, referred to in the first section of this act, or by any amendment or amendments thereof, *and shall be subject to all the provisions of the said act,* * * * and of making any contracts or arrangements with any other person or persons, corporation or corporations, *conducive to the objects of its incorporation,* or the convenient and effective management of the business of transportation of passengers and freight, and of regulating the rates of charges for such transportation."

It cannot be claimed that this act gave the Ohio and Mississippi Railway Company of Illinois any larger power than the Ohio and Mississippi Railroad Company of Illinois previously had.

By the order of the Court, the

"Ohio and Mississippi Railway Company, a corporation created by the laws of this State,"

was declared the highest bidder, as in said order recited,

"whereupon said property was declared sold to said highest bidder—said railway company—and that said company was entitled to a deed therefor."

And a deed was thereupon made to said railway company.

Was this new company, by the act of 5th February, 1861, or by any construction of that act by any Court, permitted to locate, construct, finish and maintain a new road or roads, or any other road than that for which the Ohio and Mississippi Railroad Company was originally organized to locate, construct, finish and maintain?

Are the words "conducive to the objects of its incor-

poration" ambiguous? Do they give increased power? Admit that they are ambiguous. In the case of *Moran* v. *Commissioners of Miami County* (2 Black, 722, 725), the Supreme Court held:

"That neither privileges, powers nor authorities can pass unless they are given in *unambiguous* words, and that an act giving special privileges *must be construed strictly.*"

But these words are not ambiguous. They are plain words. In 1869 this present consolidated Ohio and Mississipi Railway Company defendant considered them so plain that it was deemed necessary to ask a further act from the Legislature of this State—*not* of the Legislature of Indiana or of Ohio—authorizing it (*Post*, page 119),

"to locate, build, construct, operate and maintain a branch railroad from some convenient point on their present railroad, between Caseyville and East St. Louis, in St. Clair county, with single or double track to connect with any bridge or ferry now existing, or to be hereafter established between the Illinois shores of the Mississippi River and the City of St, Louis."

It is worthy of note that this act was passed after the consolidation forming the present defendant company, and no claim seems to have been made that any law was then operative within the State of Illinois to increase the power of the company so that it could build, purchase, or otherwise acquire any "branch," even though the original act of the Indiana Legislature proposed to incorporate a company with power to build from Cincinnati "to the city of St. Louis in the State of Missouri!" Evidently no one *then* thought that an act of the State of Indiana could act extra territorially, or that unambiguous words could be called ambiguous, and then twisted to mean far differently from their plain signification.

Let it also be noted that these acts of the Illinois Legislature were more than mere acts permitting the taking of the right of way and the exercising certain franchises by a corporation of Indiana. They differed materially from those passed by the Ohio Legislature. For by the Act of February 12, 1851, certain persons and their associates

"are hereby made and constituted a body corporate and politic by the name add style of the Ohio and Mississippi Railroad Company."

In *O. & M. R. R. Co.* v. *McPherson* (35 Mo., 13), the Supreme Court of Missouri construed these words to mean just what they say. No idea that the act merely granted a "right of way" to an Indiana corporation was entertained by that Court.

But again, in the act of February 5th, 1861, certain named persons and their associates

"are hereby constituted a body politic and corporate."

Had the legislature intended merely to grant the right of way in this State, other words would have been used and not those invariably employed when the legislature intends to pass an act of incorporation.

In *O. & M. R. R. Co.* v. *Dunbar* (20 Ill., 623), the Court says:

"The privileges of such bodies *must* be either expressly or impliedly granted. The rights and privileges legally exercised by them are exclusive in their nature, and for that reason they should be held strictly to act within the powers granted. *It will not do* to say that it is more convenient, or *more profitable* to act in a particular manner and that we may *infer* such authority."

The "most eligible route" was designated, and it was to "be confined within ten miles on either side of the Great Western Mail Route from St. Louis to Vincennes." Had it been proposed to build on any other route—from St. Louis *via* Springfield to Vincennes, for instance the company chartered in Illinois by the Act of 12th February, 1851, could not have constructed the road

In *Banet* v. *Alton & Sangamon R. R. Co.* (13 Ill., 508), the charter provided for the building of a railroad from Alton *via* Carlinville and New Berlin to Springfield. The Court reviewed, at some length, the authorities in regard to the alteration of charters, and the effect upon a contract of subscription, and then came to the conclusion that a slight deviation would not release a subscriber to the stock, but that any act is a change which attaches to the corporation a new and different enterprise.

On page 513 the Court says:

"If the charter had been so amended as to authorize the construc-

tion of a road from Alton to Vandalia or Shelbyville, or from Springfield to Beardstown or Peoria, instead of the one originally designated, the company would be committed to a new and different enterprise, and the stockholders might with much force and justice say, *this* is *not the undertaking* in which we engaged."

Before the transfer complained of in this action the stockholders of this company were not even treated with that degree of politeness which might have been indicated by an application to the Legislature to extend their charter powers. But the transfer was consummated *instanter* by two of the directors.

To the same effect,

Kean v. *Johnson*, 9 N. J. Eq. [1 Stock. Ch.] 401.
Angel and Ames, § 393.

In this case of the *O. & M. R. R. Co.* v. *Dunbar*, (20 Ill., 623), an attempt was made because of a lease made 25th January, 1856, to one Jenks, to relieve the company of its liability for damage done. The Court says, page 626:

"We are unable to perceive that it is necessary that they should lease the road and franchises to perform any act expressly authorized by their charter or to effectuate the objects of its creation,"

and overruled the plea.

This was the ILLINOIS O. & M. R. R. Co. of which the Supreme Court of that State makes this pertinent remark. It was not of the Wabash or some other.

And this was a decision of the Supreme Court of Illinois construing powers of the very company now before this Court.

The case of *Hough* v. *Cook County Land Co.* (73 Ills., 23) is readily distinguished from the case at bar. The powers of that Land Company were very general, and the Court says that if the plaintiff's claims were correct a reference to a Master would have to be had whenever and as often as any purchase of property might be proposed. In the case of the defendant company no such reference to a Master could possibly be asked for. The plain common sense of any one acquainted with the geography of

Illinois and the relative locations of St. Louis and Vincennes is all that is necessary. Common sense is presupposed.

Let counsel contend never so laboriously that the purchase complained of was advantageous to the company —as the lease to Jenks may have been, or as it may have been supposed it would be—we are "unable to perceive" that this corporation had any power to enter into the transaction complained of in this action.

In *Central R. R. Co.* v. *Collins*, (40 Ga., 582-617), it said:

"We do not think the profitableness of this contract to the stockholders of the Central and Southwestern Railroad Company has anything to do with the matter. These stockholders have a *right* at their pleasure to stand on their contract. If the charters do not give to these companies the *right* to go into this new enterprise, any one stockholder has a right to object. He is not to be forced into an enterprise not included in the charter.

"That it will be to his interest is no excuse; that is for him to judge. By becoming a stockholder he has contracted that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further; and any attempt to use the funds or pledge the credit of the company not within the legitimate scope of the charter, is a violation of the contract which the stockholders have made with each other, and of the *rights—the contract* rights—of any stockholder who chooses to say, 'I am not willing.' It may be that it will be to his advantage, but he may not think so, and he has a legal right to insist upon it, that the company shall keep within the powers granted to it by the charter."

It is an old principle of law that—

The specific grant of a particular power excludes the idea that the corporation can exercise any other power. The grant of power to do a particular act, and in a particular way, without any negative words, excludes all power to do any other act.

Ins. Co. v. *Ely*, 2 Cowan, 678.
Ins. Co. v. *Lawrence*, 3 Wend., 482.
Ins. Co. v. *Ins. Co.*, 7 Wend., 31.
Beech v. *Fulton Bank*, 3 Wend., 573.

In *Hunt* v. *Shrewsbury, &c., R. Co.*, (3 Eng. L. & Eq., 149) the Court says :

"As the Act of Parliament contains no powers which extend to this case, the company, who have funds applicable only to the particular purposes authorized by the act, *cannot apply them to other purposes.* I do not think that this question has ever been before the House of Lords; but so far as the Court of Chancery extends, it has *unaltreably* decided, that companies possessed of funds for objects which are distinctly defined by act of Parliament *cannot be allowed to apply them for any other purposes whatever,* however beneficial or advantageous it may appear."

Did the O. & M. Railway Company, organized under the act of 12th February, 1861, have the power to build, own or operate any other line of railway than the line of railroad specified in the act of 5th February, 1851 ? This question must be answered in the negative, for applying the rules for construction of statutes, the plain conclusion is that the O. & M. Railway Company did not, by any statute of the State of Illinois, obtain any powers other than those connected with the building and maintaining of the line originally designated.

V.

The attempted transfer of the Springfield and Illinois Southeastern Railway.

On the 7th of December, 1869, articles of consolidation were entered into between the Pana, Springfield and Northwestern Railroad Company, and the Illinois Southeastern Railway Company, corporations of Illinois, by which the Springfield and Illinois Southeastern Railway Company was formed.

As of the 21st of January, 1870, this consolidated company made a mortgage trust deed to secure an issue of $3,400,000 of bonds.

January 10, 1874, a bill to foreclose this mortgage was filed, and C. A. Beecher, Esq., Vice-President of the company, was appointed Receiver by this Court. On the 3d of July following, a decree of sale was entered, and on the 15th September the sale was had and the property was sold to M. Hildreth Bloodgood, Esq., for the nominal sum of $500,000. The fact, however, was that only about $40,000 was paid in cash and about $3,000,000 in bonds and over-due coupons. By a further decree, dated 18th January, 1875, Henry Crawford, Esq,, appearing for the Farmers' Loan and Trust Company, Trustees, complainants in the foreclosure suit, and M. Hildreth Bloodgood, Esq., purchaser at the sale, appearing by Henry Crawford, Esq., the Master was directed to execute and deliver to Bloodgood a deed of confirmation, which deed was thereupon and of that date executed and delivered to said Bloodgood. And the railway company defendant in that action was required to unite in the execution of that deed, and did so unite by signing the same by Charles A. Beecher, Esq., its then Vice-President.

Thus M. Hildreth Bloodgood (who, at his own request, has been admitted a party defendant in this cause, and demurs to the bill and asks to be "hence dismissed" with his "reasonable costs"), became the possessor of the property, premises, rights and things formerly belonging to the Springfield and Illinois Southeastern Railway Company.

By deed dated ten days afterwards, 28th January, 1875, M. Hildreth Bloodgood transferred and conveyed this property to Frederick Schuchardt and John Bloodgood, the consideration named in the deed being $500,000.

As of the next day Schuchardt and John Bloodgood and their wives executed a conveyance of this property to Daniel Torrance, the consideration named in the deed being $1,750,000.

As of the next day (30th January) Torrance and wife purported to execute a conveyance of this property to the

Ohio and Mississippi Railway Company, the consideration named in the deed being $1,750,000.

As of this same last date (30th January), the President of defendant railway company purported to execute a mortgage trust deed conveying to the Farmers' Loan and Trust Company all and singular the property, premises, rights and things theretofore belonging to the Springfield and Illinois Southeastern Railway Company, in trust to secure a proposed issue of bonds to the amount of $3,000,000.

This indenture of mortgage was signed by Daniel Torrance, as President, and by Daniel Torrance and wife as grantors in the deed of conveyance of the same date.

It is to be noticed that the conveyances of Bloodgood, Schuchardt and Bloodgood, and wives, of Torrance and wife, and the trust deed, are all acknowledged on the 18th day of February, 1875. They were all a part of the same transaction: A transaction which, beginning with the purchase of the property by Bloodgood, ended by what purported to be its purchase by the defendant railway company and the payment for it, not by the $1,750,000 "lawful money of the United States of America," as stated in the deed, but by a portion of the proposed issue of the $3,000,000 of bonds, all as set forth in the bill and not denied by demurrants.

Mr. Torrance signed this mortgage as President, but he and his wife also signed it individually. What was the necessity compelling Mr. and Mrs. Torrance to sign this mortgage of property they had granted—at least so the deeds say—they had granted to another party? It would be introducing a new feature in the execution of mortgages were it to be required that the grantors of real estate should join with the grantee in the execution of a mortgage made subsequent to the transfer. Who is the owner of this property? Who is the party who can legally execute a mortgage upon it? are questions that would immediately arise in the mind of any one. And especially would such a singular proceeding attract the curious attention of parties having business with a railroad corpora-

tion, or dealing in or purchasing its securities. The purchaser of a bond secured by mortgage is bound not only by the notice given in the bond itself, but also by the contents of the mortgage securing it. Of what then would be the fact that the grantor to the railroad company joined in the mortgage trust deed, even though in

"further assurance and confirmation of the same,"

be notice to all parties? Certainly it could not be claimed that it was notice that there was no infirmity in the title? If Mr. and Mrs. Torrance had conveyed this property to a party legally entitled to become the owner of it, would such a roundabout method have been adopted? A merchant in failing circumstances wishing to convey property to his wife, does so through a third party. Schuchardt and Bloodgood deeded to the railway company *via* Torrance. And in this deed Mr. and Mrs. Torrance especially "provided, always," that they did not assume any personal liability for the payment of the bonds or the interest thereon.

Why was all this done? Simply because the opinion of eminent counsel having been obtained, and that opinion being adverse to the claim that the company had the legal power to make the contemplated purchase, the advice of that eminent counsel was followed in so far as it recommended that if the purchase should nevertheless, be decided upon, the title to the property should be taken in the name of some reliable third party in order that if at any time the Courts, notwithstanding the fact that forms of an actual purchase had been gone through with, should, nevertheless, decide that the purchase was illegal, then and in that case the property might revert to that third party. Mr. Torrance continues now to be a good third party to whom the property should revert.

Infirmity of title was openly shown in this mortgage deed—infirmity of title was evident to any one and to every one who might propose to own a bond.

The conclusion, then, is irresistible that when the president of defendant company effected the purchase he was not "advised" that its legality was uncontrovertible,

but he was distinctly and positively "advised" that there were very grave doubts regarding its legality.

Hence the "reliable third party."

This plaintiff now asks an order of this Court providing that the legal owner of this property may assume possession of it.

How was this property to be paid for? The deed from Torrance and wife stated that the consideration was $1,750,000 "lawful money of the United States." But the allegation of the bill that this was not true is not denied, and the fact is that payment was accepted by Messrs. Schuchardt and Bloodgood by the issue of $1,995,000 of the new bonds with two years coupons cut off. The bill, folio 65, states that John Bloodgood & Co. are the owners of a majority of these bonds. The demurrer does not deny these facts.

The bill, in its eighteenth paragraph, relates the facts regarding the bill filed 17th November, 1876, in the Circuit Court for the District of Indiana, by one William King, and others.

In that bill William King alleged that he was the owner of $250,000 of the so-called Springfield Division bonds, and after alleging default in the payment of interest on certain first and second mortgage bonds of the defendant, but without alleging any default on the bonds claimed by him, alleged the insolvency of the company, and averring that it would be necessary to sell all the property, prayed for the appointment of a Receiver. The railway company appeared by Mr. Beecher, its attorney.

Now, who was this "William King, of New Jersey," plaintiff? The bill alleges (folio 68) that he was an employee in the office of John Bloodgood & Co., and that the bonds claimed by him were in fact the property of John Bloodgood & Co., and were handed over to William King for the purpose of instituting those proceedings. On demurrer that statement can not be controverted. It is a fact, and can never be denied.

And here we see a peculiar proceeding strangely resulting from the hasty unauthorized action of the com-

pany's agents by which they presumed and attempted to bind the corporation and its property wherever situate. The so-called "Springfield Division" lay in the State of Illinois, but here comes the temporary owner of $250,000 of the Bloodgood bonds to the U. S. Circuit Court for the District of *Indiana*, and asks for a Receiver, and as he cannot allege that he has been damaged he does allege that he believes somebody else has been damaged, and so a Receiver is appointed by the Indiana Court and is directed to take possession *inter alia*, of the so-called Springfield Division, situated in the State of *Illinois*. *Muller* v. *Dows* cannot be made to sustain this proceeding; no foreclosure being asked for under the bonds held by this clerk in the office of John Bloodgood & Co.

VI.

The Invalidity of the Bonds.

Conceding for the moment that the acts were acts of the corporation, has it the right to bind itself in the form adopted? If the corporation exceeded its powers, its act is a nulity, and however ignorantly or innocently the party dealing with it may have been, he cannot enforce the instrument made with it. It is *ultra vires*, and being a nulity, circulation from hand to hand can impart no validity to it, and as against the corporation he can stand on no better footing than his predecessors.

In *Pearce* v. *M. & I. R. R. Co.*, (21 How., 441, 443,) the Supreme Court says:

> "Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation."

Has the defendant company power to make and issue these bonds?

The liability of corporations for the frauds and misrepresentations of their agents is limited to cases in which the latter are acting within the scope of their authority.

Allen v. *London*, &c., R. Co., Law R., 6 Q.B., 65.
Swift v. *Jewsbury*, 9 id., 301, 560; 8 Eng. R., 351.

Ross v. *Estates Investment* Co., Law R., 3 Ch. 682.
Chicago, etc., Railw. Co. v. *James*, 22 Wis., 194.
Sillman v. *Fredericksburg*, &c., R. R. Co., 57 Gratt., 129.

In *Scovill* v. *Thayer* (105, U. S., 143) Justice Woods delivering the opinion of the Court, says (page 151):

"The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation."

The Constitution of the State of Illinois, Section 11, provides as follows regarding the consolidation of railroad companies:

"No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon public notice given of at least sixty days to all stockholders in such manner as may be provided by law."

And if, as would seem to have been claimed, the attempted transfer of Schuchardt's and Bloodgood's property by Schuchardt and Torrance, to the company of which they were agents with limited authority, was in fact a consolidation between two railroad companies, then such claim is met by decisions of the Courts without number that there can be no consolidation without the unanimous consent of the shareholders, and that such consent cannot be inferred as an implied condition of the charter.

Mowrey v. *Indianapolis* & Cin. R. R. Co., 4 Biss., 83.
Clearwater v. *Meredith*, 1 Wall, 25.
Pearce v. *Madison*, &c., R. R. Co., 21 How., 441.
Tuttle v. *Michigan* Air Line, 35 Mich., 247.
New Orleans, &c., R. R. Co. v. Harris, 27 Miss., 517.

In Illinois authority was given by the Act 12 February, 1851,

'to borrow such sums of money as may be necessary for completing or finishing, or operating their said railroad,"

that is, the railroad built eastwardly from St. Louis on the definite, "most eligible route to the east line of the State of Illinois, in the direction of the city of Vincennes, in the State of Indiana," within a ten-mile limit of a well-known thoroughfare.

The general railroad act of 1872 reiterates these views, when power is given to corporations created under it,

"to borrow such sums of money as may be necessary for completing, finishing, improving or operating any such railway."

and the act of May 7, 1873, especially provides that the concurrence of two-thirds of the stockholders to be expressed at a meeting to be called for that purpose.

"shall be NECESSARY to the *validity* of any such mortgage."

The notices for such meeting shall be given sixty days prior, and the resolution authorizing the bonds and the execution of the mortgage shall be recorded in the different counties. (*Post*, page 117.)

Where a company is authorized to build a railroad between to certain specified points, and within a certain definite and easily known limit, issues a bond which on its face shows that it is secured on property which the company has no right to own, it cannot be claimed that such bond is a negotiable instrument, and good in the hands of even a *bona fide* holder.

"First Mortgage Bond on the Springfield Division," * * * * "is secured by mortgage upon the Springfield Division of the Ohio and Mississippi Railroad, extending from Shawneetown, on the Ohio river, northwesterly through the towns of Fairfield in Wayne county, Flora in Clay county, Pana, in Christian county, Springfield in Sangamon county to Beardstown on the Illinois river."

These words are from the bond (*Record*, p. 58), and it may be well to call the attention of this Honorable Court that that there were not in the beginning any "innocent" holder of these bonds, and there are none such now as the case comes up on this record.

Here was a description of a line of road which the

Ohio and Mississippi Railway Company had no authority to own—had no authority to call its "Springfield Division"—which was not on the "most eligible, route" nor within the ten-mile limit, and yet we were told by the learned counsel for the owner of these bonds that the stockholder is estopped by the allegation in these bonds from denying the title of the supposed mortgagor and maker of these bonds.

We do not so understand the matter, for this is not a foreclosure proceeding, and even if it were, this corporation, having no legal capacity to own could not be estopped from denying its ownership.

Kennicott v. *Supervisors of Wayne County*, (16 Wall., 452), was cited by counsel for demurrants to the effect that negotiable securities are good in the hands of a *bona fide* holder notwithstanding infirmity in their issue.

We do not propose to discuss the well-known rules governing negotiable securities, but it cannot be conceded that every holder of what *purports* to be such is *therefore* protected.

In the very case of *Kennicott* v. *Supsrvisors* it is said: "There must, however, be an original authority by statute, to the municipality to issue the bonds," and Judge Dillon, in 1 Dillon's Reports, 263, note says:

"A muncipal corporation may successfully defend against a bond, though negotiable in form, and in the hands of innocent purchasers, on the ground that its officers or agents had no power by law to issue it. This *sound, safe,* and *true rule* of law has had the uniform approval of the State Courts: Aurora *v.* West (22 Ind., 88,) City *v.* Alexander (23 Mo., 583); Starin *v.* Genoa (23 N. Y., 439); Mercer Co. *v.* Pittsburg (27 Pa. St., 389); Mercer Co. *v.* Hackett (1 Wall., 83); Marshall Co. *v.* Cook (38 Ill., 44); Treadwell *v.* Commissioners (11 Ohio St., 183); and has received the express sanction of the Supreme Court of the United States, in Marsh *v.* Fulton Co. (10 Wall., 676.)"

In this latter case *Marsh* v. *Fulton County*, (10 Wall., 676), the bonds, set out in full on page 679, were in the most approved negotiable form. The words

"For the performance of all which the faith of the said County of Fulton is irrevocably pledged, as also the property, revenue, and resources of said County of Fulton,"

were plainly legible in them, and were intended to in-

spire confidence, but Mr. Justice Field, delivering the opinion of the Court, says:

"Were they valid when issued? The answer depends upon the law of Illinois in force." (1 Gross, 552.) That law provided

"No subscription shall be made * * * or bonds issued by any County unless a majority of the qualified voters of such County * * shall vote for the same."

And the law further required that the notices calling for the election should specify the company in which stock was proposed to be subscribed.

Bonds, by the vote of the citizens of Fulton County, were authorized to be issued to the Mississippi and Wabash and to the Petersburg and Springfield Railroad companies. The bonds were issued to another company, and the court held that they were invalid in the hands of an innocent person, *even though* they were couched in negotiable words.

In *Root* v. *Goddard*, (3 McLean, 102,) it is said:

"Are the notes void in the hands of a *bona fide* holder without notice? If they were void *ab initio*, they must be held to be so in the hands of such a holder."

In *The Floyd Acceptances* (7 Wall, 666, 676), the Court says:

"In each case the person dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper he relies upon comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; *for it is to be kept in mind* that the protection which commercial usage throws around negotiable paper *cannot* be used to *establish the authority by which it was originally issued.*"

In *Smead* v. *Indianapolis Mc., R. R. Co.* (11 Ind., 104,) the company was chartered for the specific purpose of constructing a railroad from Indianapolis to the Ohio State line, and made notes for the purpose of building another line.

"It had no power to execute merely accommodation paper, or paper to aid an undertaking not contemplated by its charter, *and such paper executed by it would be void.* o o o A bill or note executed within the power of the corporation, but by an abuse of the power in the particular instance would, if governed by the law merchant, be valid in the hands of a *bona fide* holder; but *when executed entirely without* the corporate power it *would not*, if indeed there *could be* a *bona fide* holder of such a bill."

But as the company was held to have accepted certain

amendments to its charter, by which it was permitted to issue the notes in suit, they were held valid.

Again, in *Railroad Company* v. *Howard* (7 Wall, 393, 415), the Court, referring to the objection raised in argument based upon the claim that the certificates were negotiable, says:

"But the objection is entitled to no weight, because it is *based upon an erroneous theory*. Written contracts are not necessarily negotiable simply because by their terms they enure to the benefit of the bearer."

Mr. Justice Clifford, in *St. Joseph Township* v. *Rogers* (16 Wall, 644, 659), says:

"Bonds payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the Legislature, are valid commercial instruments: *but*, if issued by such a corporation which possessed no power from the Legislature to grant such aid, *they are invalid*, even in the hands of innocent holders." o o o

"If it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled,"

then, and then only, would the corporation be estopped.

In *Meyer* v. *City of Muscatine* (1 Wall., 384), the city had power by its charter

"To borrow money for any object at its discretion,"

and the bonds issued were held binding upon the city.

But on page 393 we read:

"A party taking the bonds was *bound to look to the legal authority*,"

and further, that only

"If that were *sufficiently* comprehensive,"

the bonds were valid.

The defendant company has never had any power "to borrow money for any object at its discretion." The statutes and the constitution define and limit its power to borrowing money for certain special, defined and restricted objects, and notice was plainly given upon each and every bond that it purported to be secured upon property which the charter of the company did not permit it to own.

In *Burrill* v. *Boston* (2 Clifford, 590), it was held that the plaintiff was not even entitled to maintain an action against the city upon certain contracts promising to pay moneys, inasmuch as the corporation had no authority to incur such an obligation.

In *Hayes* v. *Ottawa & F. R. V. R. R. Co.* (61 Ill., 422), the Court say they had not been referred to the charter of the company, and had no knowledge of its powers, and that "if authority was given" to the corporation to do the act complained of, then it might act, and adds, with force:

> "Persons contracting with it must be presumed to act with full knowledge of its powers, *and cannot complain* when its acts are not in accordance with the law of its creation."

But if the act was "without authority granted in the charter, it was *merely an unlawful attempt* to accomplish what can only be done by the Legislature."

The rule of law which prevents a mortgagor from denying his own title is not applicable to a corporation whose officers have acted outside its powers.

If it were so, directors, though special agents for certain purposes within boundaries easily known, might enlarge the powers of the corporation to an indefinite extent. The policy of the laws of Illinois has been against any such conduct. These laws authorize the issue of bonds only for the purposes specified in the act of incorporation, and only on a vote of two-thirds of the stockholders, which vote shall be recorded in the different counties, and if these conditions precedent are not complied with, the act, though purporting to be that of the corporation, is simply that of individuals.

The mortgage executed by Mr. and Mrs. Torrance is probably a valid instrument as against their property, as described in the deed to them.

In *Coryell* v. *Bridge Co.* (9 N. J. Eq. [1 Stock.], 457), the Chancellor considered that where the charter of a company required five managers to constitute a quo-

rum, and there were but four present when a resolution was passed authorizing the execution of a mortgage, the mortgage is null and void, from the fact that it never received the sanction of the Board of Directors.

"The security against danger is in a steady adherence to the principle stated, that corporations can only exercise their powers over their respective members for the accomplishment of limited and well-defined objects."

Spaulding v *Lowell*, 23 Pick., 74.

In *Curtis* v. *Leavitt* (15 N. Y., 9, 274), after citing a great many cases, the Court says:

"We have here an array of authority which no court could be justified in disregarding. There are few legal principles upon which the authorities are more uniform and decided. Difficult, therefore, as may be the task of determining the validity of corporate acts under a rule which requires us to have regard not only to the substantial nature and the object of the act, but to the manner of its execution, we have nevertheless no alternative but to hold that corporations are not bound by contracts made by their officers in their behalf which exceed their corporate powers; and may set up their own want of power as a defense to such contracts. It is *impossible*, then, to *support the mortgage bonds as valid securities.*"

Sometimes the forms of a legal transaction are gone through with. But in this case the deeds were all executed by the president without the least attempt at compliance with the statute, and without the knowledge of his co-directors, except Schuchardt and Galt and without any intimation whatever to the stockholders.

The allegations of the bill are that the facts of large losses from the operations of the road while under the control of the receiver, now a director of defendant company, were fully know to Torrance, president and chairman of the executive and finance committee, and to Schuchardt, director and member of that committee, as also one of the grantors in the deed to Torrance—these allegations are not denied.

In *Railway Company* v. *Allerton* (18 Wall., 233), the directors proposed to increase the capital stock. This was opposed by one Allerton, who cited in support of his

opposition the constitution of Illinois State, Art. 11, Sec 13, which declared as follows:

"No railroad corporation shall issue any stock or bonds *except* for money, labor or property *actually* received and applied to the purposes *for which* such corporation was created, and *all* stock-dividends and *other* fictitious increase of the capital stock or *indebtedness* of any such corporation *shall be* VOID."

The Circuit Court decreed in favor of Allerton, and the company took the appeal, which was decided against them.

"We are satisfied (says this Court) that the decree must be affirmed on the broad ground that a charge so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock."

The Court considers the powers of directors, and holds that they are confined to the ordinary business of the corporation, and that they could not issue new stock, and further, that none could be issued except in accordance with the charter and other statutes of the State.

"*If* (says the Court) the *charter provides* that the capital stock may be increased, or *that a new business* may be adopted by the corporation, *this* is undoubtedly an authority for the corporation (*that is, the stockholders*), to make such a change by a stockholder's vote *in the regular way*.

"But (continues the Court) if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred."

It should be "*expressly* conferred" even in such cases as where the "charter *provides*," and only *if* it does so provide. The Court does not consider the case where a claim is made that even though such power was not provided in the charter, yet the power is conferred. What its reasoning would be in such a case is easily seen.

In the case at bar the president of the defendant company proposed to largely increase the amount of the bonded debt, and to "water" the voting power as against every stockholder. This could have been done only "*if* the charter provides," and only by the corporation—("that is, the stockholders")—and in "the regular way."

No by-law, no resolution of the directors, no resolution of the corporation could make any other way "the regular way" than that way which was in accordance with the constitution and laws of the State.

"*No* railroad corporation," says the Constitution, "shall issue any stocks or *bonds* except for money, labor or property actually received and applied *to the purposes for which such corporation was created*, and *all* stock dividends, and other fictitious increase of the capital stock or *indebtedness* of any such corporation shall be VOID."

The O. & M. Railway Company has power to own, operate and enjoy a line of railway situated on the "most eligible route" between East St. Louis and Vincennes, which "most eligible route" shall be "*confined* within ten miles on either side of the Great Western Mail Route from St. Louis to Vincennes."

"*If* the charter provides * * * that a new business may be adopted by the corporation, *this* is undoubted authority * * to make such a change * * in the regular way."

There was no authority given O. & M. to make the contract complained of.

"It is a case where the power to contract never existed."

Marsh v. *Fulton County*, 10 Wall., 676,683.

Says the Supreme Court, in *Beatty* v. *Knowler* (4 Peters, 152):

"A corporation is strictly limited to the exercise of those powers which are especially conferred upon it."

And in *Petersburgh* v. *Metzker* (21 Ill., 205), said the late Judge Breese, whose name stands second in the list of corporators of this company:

"The powers of all corporations are limited by the grants in their charter, and cannot be extended beyond them."

To the same effect,

Frye v. *Bank of Illinois*, 5 Gillman, 332.
Illinois College v. *Cooper*, 25 Ill., 148.

"A corporation created by statute can exercise no power, and has no rights except such as are expressly given or necessarily implied."

Huntington v. *Savings Bank*, 96 U. S., 388.

The charter is the index to the powers of the corporation.

Aurora v. *West*, 9 Ind., 74.
Root v. *Goddard*, 3 McLean, 103.

But the charter of this company did not provide that the corporation could own any other line of railway than that "confined" within certain limits.

"This is not a case where the party executing the instruments possessed a general capacity to contract."

Marsh v. *Fulton County*, 10 Wall., 683.

The bonds are void, as against the Ohio and Mississippi Railway Co., and the Court below should have made an order to that effect.

VII.

The Doctrine of Estoppel does not Apply.

"An estoppel by matter of deed," says *Bigelow on Estoppel*, 267, "may be defined to be a preclusion against the *competent* parties to a *valid* sealed instrument and their privies, to deny its force and effect by any evidence of inferior solemnity."

But it is an essential element of estoppel by deed that the deed itself should be a valid instrument; a void instrument under seal does not work estoppel.

"But where a body of individuals is vested with power only to engage in a special business, any attempt on the part of such a corporation to change the object of their association, or undertake new and distinct pursuits from those described in their organic law, such assumptions are *ipso facto* illegal, and whenever brought to the notice of courts by third persons, or the parties themselves to the contract, will not be maintained. *In such case there is no estoppel*, for there is no *legal competency* in the contracting *parties;* and the affirmance or disaffirmance of their acts, by matter *in pais*, or by corporate resolutions, can give no validity to that act which never legally existed. If a corporation *could be estopped* from setting up its want of authority to enter into contracts made by its agents, its power might be *indefinitely* enlarged, and what it was *not* permitted to do *by its charter* would become obligatory by its acquiesence."

O. & M. R. R. Co. v. *I. & C. R. R. Co.*, 5 Am. L. P., 733.

Any other rule of law would soon become a *reductio ad absurdum.*

It would be folly to claim that the legal capacity of a corporation could be enlarged by estoppel.

"Having no corporate capacity to make the contract of purchase the plaintiff never acquired any title to the note in suit, and the attempted act of purchase was strictly *ultra vires.*"

F. & M. Bank v. *Baldwin*, 23 Maine, 198.

In *Fowler* v. *Scully* (72 Pa. St., 456), it is held:

"The defendant has the right to avail himself of the defence and prevent a recovery."

To the same effect,

Woods v. *People's Nat. Bank*, 83 Pa., 54, 57.
Weckler v. *First Nat. Bank*, 42 Md., 581.

Loan Association v. *Topeka* (20 Wall, 665), *Commercial Bank* v. *Iola*, (2 Dillon, 353), *Allen* v. *Inhabitants of Jay*, (60 Me., 124), *Lowell* v. *Boston* (111, Mass., 454), and *Weisner* v. *Village of Douglass* (64 N. Y., 91), all confirm the proposition that however negotiable in form the bonds of cities or towns, may be, yet if issued in aid of purely private purposes, such bonds are void in the hands of all parties, and the party issuing them is not estopped setting up defence founded on that fact.

In *South Yorkshire, &c.*, v. *Great Northern, &c.*, (9 Excheqr., 55, 84), Baron Parke says that generally speaking, all corporations are bound by their acts under the corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed 'But," he then proceeds, "when a corporation is created by an act of Parliament for *particular purposes* with *special powers*, then, indeed, another question arises: their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the

Legislature meant that that such a deed should not be made."

The *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.

In *Marsh* v. *Fulton County* (10 Wall, 683), the Supreme Court says:

"The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder,"

of a bond, and this decision simply followed *Aspinwall* v. *Davies County* (22 How., 361)—a case in which the O. & M. R. R. Co., of Indiana, was interested.

Says Mr. Justice Miller, in *Loan Association* v. *Topeka* (20 Wall, 645, 667):

"We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel."

In this case in 20th Wallace, not only did the bonds have every appearance of being legally issued, but there was in fact an act of the Legislature especially authorizing their issue, and yet as the act was unconstitutional the Supreme Court held that in a suit brought on such bonds or the interest coupons attached, they were properly declared void.

In *San Antonio* v. *Mehaffy* (96 U. S., 312), the city was held estopped from denying the verity of the recital in certain bonds, and that they were valid in the hands of a *bona fide* purchaser for value before maturity. But it will be noticed that in that case the Court held that the act of the Legislature authorizing these bonds was a valid act, and that the issue of the bonds not being *ultra vires* of the corporation, the doctrine of estoppel was applicable.

The rule that a mortgagor is estopped to deny his own title does not apply to corporations created with definite powers. This is a case where the corporation had no general power to contract.

"The chief point of difference between the natural and the ar-

tificial person is that the former may do whatever is not forbidden by law; the *latter can do* only what is authorized by its charter."

Railroad Company v. *Harris*, 12 Wall., 55, 81.

Having no legal capacity to own, it is not estopped from denying its ownership.

"The mere fact that a corporation has received the cosideration of, or otherwise derived advantage from a contract *ultra vires* does not involve it in any liability upon such contract."

Price's Ultra Vires, 608.

In *Hood* v. *N. Y. & N. H. R. R. Co.* (22 Conn.,501), the Court says:

"The defendants were incorporated by the Legislature for the purpose of making or using only a railroad. Their very name, as well as the location and business of their road, is sufficient notice that they are not incorporated for running stages throughout the State; and no person can assume or suppose the defendants are to go beyond the appropriate business of a railroad. The idea of an imposition on the public as to these stages running off from the road, to and from Litchfield and other places, as the defendants' stages, is incredible and preposterous. *The public knew where the charter may be seen, and what it contains.* o o o

"An infant is never estopped, nor a married woman, nor ought a body of stockholders to be, united as they are under a specific charter; especially when the directors have disregarded it and assumed to act according to their own pleasure.

* * * "To hold that the entire body of stockholders gave their consent to the contract in question, and that therefore it is good, is absurd and puerile. But suppose they did; this was not a corporate act, and has therefore no corporate character. We repeat that the directors and stockholders have no corporate powers or relation, and can give no corporate consent, but what is within the appropriate business of the charter. * * * The Legislature has absolutely marked the limit of their power, and they cannot exceed it, under the charter; and if the directors, even with all the stockholders at their side, transcend the limits of the charter, and make contracts foreign to their business, they only act for themselves. The reason is, *there can be no consent of the corporation.* The consent of individual stockholders, however repeated, is not their consent, nor is it admissible proof to establish consent; so that, if it was true every stockholder had expressed his consent, it would make no difference in the case. *If this is not so,* there are no restrictions or limitations on chartered companies, and they may do anything and everything the directors please which is not absolutely unlawful. The exercise of power is held to prove itself; *which is absurd.* o o o

"The directors represent them (the stockholders) only while they act within the scope of the charter; the charter is the measure of their

power, and *sad* would it be if directors could trample upon this, and yet bind the stockholder as firmly as if they were acting within it. If the directors have done wrong, let them suffer the consequences.

"We place our judgment upon *a plain principle of equity and law*, viz.: that these defendants are not bound by a contract they had no power to make, and *are not estopped* setting up this matter in defence."

The O. & M. R. R. Co., of Illinois, was chartered to own and operate a railroad on a certain specified route which is specifically set forth in the charter.

In *Bradley* v. *Ballard* (55 Ill., 413), the complainant became a stockholder, and, as the Court says, "from the name and character of the company he *must have known* it was organized for the purpose of running beyond the limit of this State," and therefore he was estopped from denying the validity of notes given for prosecution of such operation.

The facts in the case at bar are the reverse.

The bonds and the mortgage in the case at bar do not contain recitals estopping the stockholder from questioning the acts of the officers of the company. The bond, as we have seen, distinctly describes property which the company had no authority to own. The mortgage does the same. The fact of Mr. and Mrs. Torrance joining in the latter is evidence of questionable title.

The bonds contain notice to every one that they are not negotiable instruments, in the holding of which a *bona fide* owner would be protected.

VIII.

The Attempted Transfer and the Issue of Bonds could not be Ratified.

Quod ab initio non valet in tractu temporis not convalescit.

Debile fundamentum falit opus.

Quod non habet principium not habet finem.

These "expressions of condensed wisdom" apply to the case at bar.

Plaintiffs deny that there was any ratification which can in any way be considered an approval of the acts of Torrance and those negotiating with him.

If it is claimed by Schuchardt and Bloodgood, holders of the bonds handed over by Torrance to Schuchardt, that the transactions between Torrance, Schuchardt and Bloodgood were fully ratified by the fact that at a subsequent annual meeting of the company an irregular vote was had, for the purpose of whitewashing the actions of Torrance, Schuchardt and Bloodgood, we have merely to call the attention of this honorable Court to the statement regarding that meeting set forth in the answer of the Railway Company at pages 65 and 66 of the *Record*. But if any stress should be attempted to be laid upon this attempted ratification, it is proper for us to consider what was the attempt made at that meeting. It was nothing less than an irregular effort to confirm an alteration in the fundamental acts authorizing the corporation to transact business, and that, too, by the vote of a minority of the stockholders; and this was attempted to be done, notwithstanding the well-known rules of law—first, that the minority have very limited powers; second, that the powers of the majority are not unlimited, as even the majority are not the association itself, but only a part of it; and third, that an alteration in the character of the corporation itself cannot be effected without the unanimous consent of the shareholders.

That such consent cannot be implied seems self-evident. The members of a corporation, when they unite to do business under a particular charter, do not *impliedly* agree to become partners to a different charter, and it follows upon the same principle that no majority of the shareholders of a corporation, much less any agent, can have any implied authority to agree to an alteration of the charter.

New Orleans, etc., R. R. Co. v. *Harris*, 27 Miss., 517.

Stevens v. *Rutland, etc., R. R. Co.*, 29 Vt., 545.

Lauman v. *Lebanon Valley, etc., R. R. Co.*, 30 Pa. St, 46.
Zabriskie v. *Hackensack, etc., R. R. Co.*, 18 N. J. Eq., 178.
Black v. *Delaware, etc., Canal Co.*, 24 N. J. Eq., 466.
Clearwater v. *Meredith*, 1 Wall, 40.

If a corporation ratify the legal act of its agents, the corporation is bound thereby, but it is essential that the party ratifying should be able to do the act. Ratification operates on a past transaction, and effects nothing beyond dating back the utterances of the principal, but a contract *ultra vires* the charter cannot be made valid by any subsequent act of the corporation.

Says the Court, in *Marsh* v. *Fulton County* (10 Wall., 676, 684):

"It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the Supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the Supervisors. But the *answer* to them all is that the power of ratification did not lie with the Supervisors. A ratification is, in its effect upon the act of the agent, equivalent to the possession by him of previous authority. * * * The Supervisors possessed no authority. * * * They could not, therefore, ratify a subscription. * * * That would be equivalent to saying that an agent not having the power to do a particular act for his principal, could give validity to such act by its direct recognition."

A void act is not susceptible of ratification.
Story on Agency, § 240.

The charter of this company and the statutes do not give a general authority to issue bonds.

"The act of incorporation is to them an enabling act. It gives to them all the power they possess."

Head v. *Providence Ins. Co.*, 2 Cranch, 167.

The corporation having no power to obtain the property, the President could not legally do any act which would result in their obtaining possession of it.

"One principle, however, will always hold, viz.: that whatever is beyond the power of the corporation is, *a fortiori*, beyond that of the directors, and, therefore, in considering the legal effect of any proceeding done, entered upon or ratified by them, we must first consider whether such proceeding could have been done, entered upon, or ratified by the corporation itself. If not so, then, evidently, in accordance with the most elementary of the principles flowing from the doctrine of *ultra vires*, such proceeding will be simply void as far as the corporation is concerned."

Green's Brice's Ultra Vires, 411.

No amount of ratification can make good an act without the scope of the corporate authority.

Martin v. *Zellerbach*, 38 Cal., 300.
Peterson v. *Mayor of N. Y.*, 17 N. Y., 449.
Hood v. *N. Y., etc., R. R. Co.*, 27 Conn., 50.
Shauneetown v. *Baker*, 85 Ill., 563.

In *Cumberland Coal Co.* v. *Shearman* (40 Barb., 573,-000), Judge Davies says:

"But even if the confirmation had been legally made, and by a majority of the stockholders, which it clearly was not * * * the sanction of the major part will not be obligatory on the rest."

Acquiescence for years, by stockholders, in appropriating funds to carry out schemes beyond the powers of a corporation will not legalize the act.

Coleman v. *Eastern Counties R. Co.*, 4 E. Ry. Cases, 513.

Said Vice-Chancellor Stewart, in *Pridax* v. *Londsdale* (11 Weekly Reporter, 531):

"Acquiescence, without full and sufficient knowledge of the real nature and effect of the instrument, can be of no avail."

To render ratification conclusive, the principal must, at the time of ratification, be fully aware of every material fact, and his act of ratification be an independent substantive act, and he must not only be aware of the facts, *but apprised of the law as to how those facts would be dealt with if brought before a Court of equity.*

Hoffmann Coal Company v. *Cumberland Co.*, 16 Md., 456.

In Thomas *v.* Railroad Co. 101 U. S. 71, Mr. Justice Miller refers to *Eastern Counties Railway Co.* v. *Hawkes* (5, H. L. cas, 331), and *McGregor* v. *The Deal & Dover Railway Co.* (22 Law J. N. S. Q. B., 69; 18 Q. B. 618) and says:

"Both these cases are cited approvingly in the opinion of Lord Cairns in the Ashbury Company, on appeal in the House of Lords.

"This latter case as decided in the Exchequer Chamber (Law Rep. 9 Exch., 224), is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

"But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborn, Chelmsford, Hatherly, and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholder, nor can it by any partial performance become the foundation of a right of action."

In *Hood* v. *N. Y. & N. H. R. R. Co.* (27 Conn., 50), it was said that the stockholders had given their consent, but the Court replied:

"The Legislature has absolutely marked the limit of their power, and they cannot exceed it, under the charter, and if the directors, even *with all the stockholders at their side*, transcend the limits of the charter, and make contracts foreign to their business, they only act for themselves. *The answer is, there can be no consent of the corporation.*"

What a corporation can authorize its officers to do, it can ratify when done, it is not more clearly a just rule than its converse, than what a company cannot do the corporation cannot ratify if done by an agent.

Speaking of the power of corporate bodies to contract, Chief Justice Marshall, in *Head* v. *Providence Insurance Co.* (2 Cranch, 169), says:

"He who acts by another acts for himself. He who authorizes another to make a writing for him makes it himself. But with these

bodies which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act; *it gives them all the power they possess;* it enables them to contract, *and when it prescribes* to them a *mode* of contracting they *must observe* that mode, or the instrument *no more creates a contract than if the body had never been incorporated.*"

In *Commissioners of Tippecanoe Co.* v. *R. R. Co.*, 50 Ind., 85, 112, the Supreme Court of Indiana say:

"It is also claimed by the appellees that if the contract was originally *ultra vires*, the corporation, the parties complaining of it, have acquiesced in its terms such a length of time, received benefits under it, and confirmed it by so many acts, that they are now estopped from questioning its validity. A contract *ultra vires*, the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make they cannot confirm. A void act can never become valid merely because it remains unquestioned,"

In *Marsh* v. *Fulton County* (10 Wall., 676, 684), the Court says:

"A ratification can only be made when the party ratifying possesses the power to perform the act ratified."

Lord Chief-Justice Jervis, in *East Anglian Railway Co.* v. *Eastern Counties Railway Co.* (11 C. B., 775), says:

"If the contract is illegal as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for if the company is a corporation for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds."

There was no power in the corporation to ratify the transfer of the property and the issue of bonds.

In *Scovill* v. *Thayer* (105 U. S. 143) Mr. Associate Justice Woods quoted at length (page 150) from the opinion in *Stace* v. *Worth's Case* (law Rep. 4 Ch. App., 622) and closes with words particularly applicable to the case at bar.

"This was a void agreement with a void acting upon

it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings."

Any "practical difficulty" in the way of the Court granting the prayer of the bill is only an imaginary one.

We can see none.

These plaintiff's and appellants, believing that they who come into a Court of Equity seeking equity should do equity, have no desire to ask, and do not ask, that while the bonds are declared void and the purchase illegal the defendant company shall be allowed to retain one iota of benefit which may have been derived either from the possession of the property or the issue of the bonds.

As to the bonds not paid over to the Bloodgoods and Schuchardt *via* Torrance, they are pledged for loans to the defendant company, (*Record*, page 67) and it is responsible for the money borrowed, even as if the same had been obtained on void bonds as collateral. The same rule would hold good as if it had been obtained on forged bonds. The lenders have their remedy against the company for the amount loaned.

Let the mandate of this Court order the property delivered to Torrance and declare the bonds void, and there is not a vestige of a practical difficulty.

Let the mandate of this Court to the Court below direct a reference to a Master to take testimony and report the damage, or benefit, if any, done the property while in the possession of the defendant company, and the cash expenditure thereon, in order that a full account may be stated and settled in accordance with equity.

This plaintiff asks nothing but justice.

CHARLES W. HASSLER,
Counsel for Plaintiffs,
55 Broadway,
New York.

CHARTER

OF THE

OHIO & MISSISSIPPI RAILROAD COMPANY.

AN ACT to incorporate the OHIO AND MISSISSIPPI RAILROAD COMPANY, and for other purposes.

(Private Laws, Illinois, 1851, p. 89.)

SECTION 1.—Be it enacted by the people of the State of Illinois, represented in the General Assembly, that Joseph G. Bowman, Sidney Breese, James Hall, Alfred Kitchell, Arthur McCauley, George W. Pace, Benjamin Bond, James L. D. Morrison, A. T. Ellis, John Ross, Luther M. Kennett, John O'Fallon, James H. Lucas, Andrew Christy, Daniel D. Page, John Law, Peter Chouteau, jr., Benjamin F. Rittenhouse, Samuel B. Chandler, John A. McClernand, John S. Martin, Aaron Shaw, William W. Roman, Green C. Crossou, and such other persons as may associate with them for that purpose, are hereby made and constituted a body corporate and politic by the name and style of the Ohio and Mississippi Railroad Company, with perpetual succession; and by that name and style shall be capable in law of taking, purchasing, holding, leasing, selling, and conveying estate and property, whether real, personal, or mixed, so far as the same may be necessary for the purpose hereinafter mentioned, and no further; and in their corporate name may sue and be sued; to have a common seal which they may alter or renew at pleasure, and may have and exercise all powers, rights, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as the same are hereinafter set forth.

SECTION 2.—The Ohio and Mississippi Railroad Company shall have full power and authority to locate, and from time to time to alter, change, re-locate, construct, re-construct, and fully to finish, perfect and maintain a railroad with one or more tracks, commencing at Illinois-

town, on the Mississippi River, in the county of St. Clair, and running from thence on the most eligible route to the east line of the State of Illinois, in the direction of the City of Vincennes, in the State of Indiana; and to transport, take and carry property and persons upon said railroad by power or force of steam, or of animals, or of any mechanical or other power, or combination of them, which said company may choose to use or apply. And for the purpose of constructing said railroad or way, said company shall have authority and power to lay out, designate, and establish their road in width not exceeding one hundred and fifty feet, through the entire line thereof; and make, take and appropriate to their own use, all such lands so designated for the line and construction of said road, upon first paying or tendering therefor such amount of damage as shall have been settled by appraisal, in the manner hereinafter provided, on all such lands as may be taken, or upon any track which may be located by said company, and for the purpose of cuttings and embankments, and for the purpose of obtaining of stone, sand and gravel, may take and appropriate as much more of land as may be necessary for the proper construction, maintenance and security of said road; and for the construction and security of said road, and for constructing shops, depots, and other suitable, proper, and convenient fixtures, in connection with and appurtances to said railroad, may take and have, use, and occupy any lands upon either side of said railroad not exceeding two hundred feet in depth from said railroad, said company taking all such lands as gifts, or purchasing or making satisfaction for the same, in the manner hereinafter provided: *Provided*, That this section shall not be construed to restrict or prevent the construction of public roads, or canals, or railroads, across the road of said company, when deemed expedient, but so as not materially to impair or obstruct the same.

Section 3.—The said company, and under their direction, their agents, servants, and workmen, are hereby authorized and empowered to enter into and upon the

lands or grounds of or belonging to the State, or to any person or persons, bodies politic or corporate, and survey and take levels of the same, or any part thereof, and to set out and ascertain such parts as they shall think necessary and proper for making said railroad, with one or more sets of tracks of rails, and for all the purposes connected with said railroad, for which, the said corporation by the last preceding section, is authorized to have, take and appropriate any lands, and to fell and cut down all timber and other trees standing or being within one hundred feet on each side of said line of said railroad, the damage occasioned by the felling of such trees, unless otherwise settled, be assessed and paid in manner hereinafter provided for assessing and paying damages for lands taken for the use of said railroad company, and also to make, build, erect and set up, in and upon the route of said railroad, or upon the land adjoining or near the same, all such works, ways, roads and conveniences as may be requisite and convenient for the purposes of said railroad; and also, from time to time, to alter, repair, amend, widen, or enlarge the same, or any of the conveniences above mentioned, as well as for carrying, conveying goods, commodities, timber, or other things to and upon the said railroad, as for carrying or conveying all manners of materials necessary for the making, erecting, furnishing, altering, repairing, amending or enlarging the works of or connected with said railroad, and to contract or agree with the owner or owners thereof for earth, timber, gravel, stone, or other material or any articles whatever, which may be wanted in the construction or repair of said railroad, or any of its appurtenances, they, the said company, doing as little damage as possible in the execution of said powers hereby granted, and making satisfaction in the manner hereinafter mentioned for all damages to be sustained by the owners or occupiers of said land.

Section 4.—The said company shall have power and authority to receive, take and hold all such voluntary grants and donations of land and real estate for the pur-

poses of said railroad, as may or shall be made to said company, to aid in the construction and maintenance and accommodation of said railroad; and said company may contract and agree with the owners or occupiers of any land upon which said company may wish to construct said railroad or way, or which said company may wish to use or occupy for the purpose of procuring stone, sand, gravel or earth, or other materials to be used in embankments or otherwise, in or about the construction, repair or enjoyment of said railroad or which said company may wish to use or occupy in any manner, or for any purpose or purposes connected with said railroad, for which said company is empowered or authorized by this act, to take, have, or appropriate any lands, and to receive and take grant and conveyances of any and all, and of any and all interests and estates therein, and to them and to their successors or assigns in fee or otherwise; and in case said company not agree with such owners or occupiers of such lands as aforesaid, so as to procure the same by the voluntary deed or act of such owners or occupiers thereof, or if the owners or occupiers, or any or either of them, be a *femme covert*, infant, *non compos mentis*, unknown or out of the county in which the land or property wanted may lie or be situate, the same may be taken and paid for, if any damages are awarded, in the manner provided for in "an act to provide for a general system of railroad incorporations" approved Nov. 5th, 1849, and the final decision or award shall vest in the corporation hereby created, all the rights, privileges, franchises and immunities in said act contemplated; and provided that any appeal that may be allowed under the provisions of the act above recited, or by virtue of any general law of this State, shall not effect the possession by said company of the land appraised; and when the appeal may be taken, or writ of error prosecuted by any person or persons other than the said company, the same shall not be allowed except on the stipulation of the party so appealing or prosecuting such writ of error that the said company may enter upon and use the lands described in the petition for the uses and purposes therein set forth,

upon said company giving bond and security to be approved by the clerk of said court, that they will pay to the party so appealing or prosecuting such writ of error, all costs and damages that may be awarded against them on the final hearing of such appeal or writ of error, within thirty days after the rendition thereof, or forfeit all right to use the land or way so condemned.

SECTION 5.—The capital stock of said company shall be one million of dollars, which may be increased from time to time by a vote of a majority in interest of stockholders at their annual meeting, or at any special meeting that may be called for that purpose by the directors of said company, to any sum not exceeding the entire amount expended on account of said road; which stock shall be divided in shares of fifty dollars each, which shall be deemed personal property, and may be issued, certified, transferred and registered in such manner and at such places as may be ordered and provided by the Board of Directors, who shall have power to require the payment of stock subscribed in the manner and at the time, and in such sums as they may direct; and on the refusal or neglect on the part of the stockholders, or any of them, to make payment on the requisition of the Board of Directors, the shares of such delinquents may, after thirty days' public notice, be sold at public auction, under such rules as the Directors may adopt. The surplus money, if any remains after deducting the payment due with interest, and the necessary costs of sale, to be paid to the delinquent stockholder. The Board of Directors hereinafter named and appointed, shall cause books to be opened for subscription to the capital stock of said company, at such times and places, and in such manner as they shall direct: *Provided*, That as soon as two hundred thousand dollars of *bona fide* subscription shall be made to said capital stock, and twenty-five per cent. thereon paid, it shall be lawful for said company to commence the construction of said road.

SECTION 6.—All the corporate powers of said company

AMENDMENT.

AN ACT entitled "an Act amendatory of an act entitled 'An Act to incorporate the OHIO AND MISSISSIPPI RAILROAD COMPANY, and other purposes, approved February 12th, 1851.'"

(Laws 1852, p. 122.)

SECTION 1.—Be it enacted by the people of the State of Illinois, represented in the General Assembly, that the Ohio and Mississippi Railroad Company are hereby authorized to borrow money, from time to time, on the credit of the company, at any rate of interest not exceeding seven per cent. per annum, as may be agreed between the parties, for the sole purpose of constructing said road, and furnishing the same with cars, locomotives, and other machinery necessary to carry on the operations of said company, and may issue its corporate bonds therefor, in denominations of not less than five hundred dollars; and to secure the payment thereof, with the interest that may accrue thereon, may mortgage their corporate property or franchises, or convey the same by deed of trust for said purposes, and they may, by their president or other officers, or agents, sell, dispose of, or negotiate such bonds or stock of company, at such time and places, either within or without this State, and at such rates, and for such prices, as in their opinion will best advance the interests of said company, and if such bonds or stocks are thus sold at a discount, such sale shall be as valid and binding in every respect as if sold at par value.

SECTION 2.—The certificate of the secretary of said company under the corporate seal thereof, shall be received in all courts of justice and elsewhere, as evidence of the regular organization of said company under its charter, and of any act or order of the Board of Directors of said company, and the corporate rights, privileges and franchises of said company as granted, are hereby declared to be in full force and effect; and all causes, if any exist, of forfeiture waived.

The said company shall carry and transport the mail of the United States, on such terms as may be agreed, and all such freights and passengers as may be offered, if required to do so, on the terms usual with like rail road companies.

SECTION 4.—The capital stock of the company may, from time to time be increased by order of the Board of Directors, when deemed necessary, to any amount not exceeding the estimated cost of constructing and equipping said road; and subscriptions to the increased capital stock may be made from time to time, on such terms as may be ordered and directed by the Board of Directors.

SECTION 5.—This Act shall be deemed and taken as a Public Act, and shall be in force from and after its passage.

Approved, June 22d, 1852.

SUPPLEMENT.

AN ACT.Supplemental to an "Act to incorporate the Ohio and Mississippi Railroad."

(PRIVATE LAWS ILLINOIS, 1853, p. 92.)

SECTION 1.—Be it enacted by the people of the State of Illinois, represented in the General Assembly, That it shall be lawful for the Ohio and Mississippi Railroad Company to elect a vice-president from the persons composing the Board of Directors, who shall, in the absence or disability of the President, have the same powers, and perform the duties appertaining to the office of President, and such other duties as the said company may prescribe by the By-laws or resolutions of its Board of Directors.

SECTION 2.—This act to take effect and be in force from and after its passage.

Approved, February 11th, 1853.

Incorporation of the Ohio and Mississppi Railway Company,

With power to purchase rights and franchises of O. & M. R. R. Co., etc.

An Act to incorporate the Ohio and Mississippi Railway Company, and for other purposes.

(Private Laws, 1861, p. 508.)

Section 1.—Be it enacted by the people of the State of Illinois, represented in the General Assembly, That Jesse K. Dubois, Ozias M. Hatch, J. N. Haynie, Peter N. Ham, Thomas Brown, George W. Jenks, Daniel R. Garrison, Samuel Gaty, George K. McGunnegle, Samuel L. M. Barlow, Daniel D. Page, Henry D. Bacon, and George Partridge, and such other persons as may associate with them for that purpose, are hereby constituted a body politic and corporate, by the name and style of the "Ohio and Mississippi Railway Company," for the purpose of purchasing and taking a conveyance of all the railway property, real and personal rights and franchises of the Ohio and Mississippi Railroad Company, incorporated by the Act of the General Assembly of this State, entitled "An Act to incorporate the Ohio and Mississippi Railroad Company, and for other purposes." Approved, February 12th, 1851, or any part of said property, rights and franchises, either by private contract, or at any judicial sale thereof, which may hereafter take place.

Section 2.—The said corporators, and such persons as may associate with them for that purpose, are hereby fully authorized and empowered at any time within thirty days after the passage of this Act, to call a meeting for the purpose of organization by advertisement, published at least ten days previously in one of the public newspapers published at Springfield, in the State of Illinois, and to organize by the appointment of one of their members as president, and of not less than seven, nor more than thirteen of their members as directors; those so chosen shall be the first Board of the corporation

hereby created, and shall hold office until their successors shall be appointed according to the provisions of said Act before referred to.

SECTION 3.—The said corporation shall possess all the powers and privileges conferred on the Ohio and Mississippi Railroad Company, by the act incorporating the same, referred to in the first section of this Act, or by an amendment or amendments thereof, and shall be subject to all the provisions of the said Act; and shall, in addition, possess, the power of assuming any debt or debts, liability or liabilities of the said Ohio and Mississippi Railroad Company, in its discretion, and of issuing bonds secured by mortgage or otherwise, in its discretion, to secure the payment of them, and of making any contracts or arrangements with any other person or persons, corporation or corporations, conducive to the objects of its incorporation, or the convenient and effective management of the business of transportation of passengers and freight, and of regulating its rates of charges for such transportation.

SECTION 4.—The capital of the said corporation shall be two millions of dollars, with the power to increase the same as conferred by the aforesaid acts, and shall be distributed among the corporators, as they may agree.

SECTION 5.—This Act shall be deemed and taken as a public Act, and shall be in force from and after its passage: *Provided*, That the corporation hereby created shall pay all sums due or to become due to citizens of this State, for labor or supplies of any kind in operating said road as a condition precedent to the vesting of the franchise in this Act.

SECTION 6.—The meeting of the corporators for the purpose of organization, and the meeting of the Board of Directors after organization may be in the City of St. Louis, in the State of Missouri, or in this State, and all acts done at such meeting in the City of St. Louis, shall be as valid as if done within this State.

Approved, February 5th, 1861.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF ILLINOIS.

June Term, 1862.

HENRY D. BACON and others,

v.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY and others.

This cause coming on to be heard at the June term, 1862, of this court, to which term it was adjourned by an order entered at March adjourned term thereof, and the parties having appeared by their attorneys, the complainants presented their report showing their compliance with the orders of the decree entered by this Court in this cause at said March term, wherein they were ordered as trustees of certain bondholders, and as commissioners of said Court, to proceed on the 2d day of June, A D., 1862, to sell the property and franchises of said railroad company, in accordance with the prayer of said complainants in the bill of complaint filed herein by them, and it appearing to the satisfaction of the Court from the said report and accompanying exhibits, marked A. B. and C., that said commissioners in compliance with the orders of said decree, did give public notice of said sale for sixty days from and after the entering of said decree, and before the day of sale, in the Illinois *State Journal*, published at Springfield, State of Illinois, and in the New York *World*, published in the City of New York, and of the time and terms of said sale; and it also appearing to the satisfaction of the Court that said commissioners did comply with the order of said decree by furnishing to the Clerk of the Court, and by retaining in their own hands, a correct schedule of all and singular

the property and premises ordered to be sold, which schedules have been open to examination of all parties desiring to purchase said property, or having any interest in the same; and it further appearing to the Court that on said 2d day of June, 1862, said commissioners did, between the hours of 10 o'clock, A.M., and 4 o'clock, P.M., proceed to expose said property for sale at the door of the United States Court House, in the City of Springfield, Illinois, and that the Ohio and Mississippi Railway Company, a corporation created by the laws of the State, did bid the sum of $482,000 for said property, and that there was no higher bidder; whereupon said property was declared sold to said highest bidder—said railway company—and that said company was entitled to a deed therefor; and it further appearing to the Court that said railway company, intending to be a bidder at said sale, did, in accordance with the decree, previously deposit in the Springfield Marine and Fire Insurance Company, in said Springfield, the sum of $20,000, in the coupons of the said second mortgage bonds, as provided in said decree, said coupons being the past due coupons on said bonds; and it further appearing to the Court that said railway company, the highest bidder aforesaid, has, in compliance with the order of the Court, made payment of said sum of $482,000, the amount of said bid, in the manner allowed and ordered by said decree; in consideration thereof, and of the premises aforesaid, it is hereby ordered and decreed that said sale be and is hereby confirmed and made final, and said railway company declared the purchaser and owner of said property and franchises of the said Ohio and Mississippi Railroad Company, and entitled to a good and sufficient deed of conveyance and assignment thereof in fee simple; and further, said commissioners are hereby ordered and directed without delay, to execute and deliver such deed of conveyance and assignment to said purchaser; and said Ohio and Mississippi Railroad Company, its officers and agents, are ordered and directed upon request of said railroad company, to surrender possession of such property and franchises

to said railway company, its officers and agents, as they may direct; and further, it is ordered that upon request of said railway company shall make, execute and deliver to said railway company a good and valid deed of conveyance and assignment of said property, premises and franchises, and of all right, title, and interest in and to the same.

AN ACT to enable railroad companies to borrow money and to mortgage their property and franchises therefor. Approved May 7, 1873. In force July 1, 1873.

SECTION 1.—Be it enacted by the people of the State of Illinois represented in the General Assembly, That every railroad company organized under any law or laws of this tate in force before the first day of March, A. D., 1872, is hereby empowered from time to time to borrow such sums of money as may be necessary for completing, furnishing, improving or operating any such railroad, and to issue and dispose of its bonds for any amount so borrowed, and so mortgage its corporate property and franchises to secure the payment of any debt contracted by such corporation for the purposes aforesaid; but the concurrence of the holders of two-thirds in amount of the stock of such corporation—to be expressed in the manner hereinafter provided—shall be necessary to the validity of any such mortgage; and the order or resolution for such mortgage shall be recorded as provided in this act; and the directions of such corporation shall be empowered in pursuance of any such order or resolution, to confer on any holder of any bond for money so borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of such corporation at any time not exceeding ten years after the date of such bond, under such regulation as may be provided in the by-laws of such corporation.

SECTION 2.—The concurrence of the holders of at least two-thirds in amount of the capital stock of such corpora

tion in the creation of any such debt and the execution of any such mortgages, shall be made manifest by the votes cast by such stockholders in person or by proxy, on the passage of appropriate orders or resolutions at a meeting of the stockholders of such corporation, called by the directors thereof for such purpose.

SECTION 3.—The directors of such corporation shall give notice of such meeting by causing written or printed notices thereof to be either personally served upon or duly mailed (postage prepaid) to such stockholders whose names and address shall be known to said directors, such notice to be so mailed at least sixty days before the time of such meeting. The said notices shall state the time and place fixed for such meeting and the purpose thereof, as well as the amount of the proposed indebtedness. The said directors shall also cause like notices to be inserted in some newspaper published in each county through which said road shall run, (if any newspaper shall be published therein), at least sixty days prior to the day appointed for such meeting.

SECTION 4.—When such meeting shall be held, the resolution or order authorizing the creation of such indebtedness, and the execution of the mortgage to secure the same, together with the result of the vote thereon, shall be recorded in the office of the recorder of deeds of each county through which said road shall run, and shall also be recorded in the office of the Secretary of State.

AN ACT to authorize the Ohio and Mississippi Railway Company to build a branch to connect their road with a bridge or ferry at East St. Louis.

(PRIVATE LAWS, 1869-vol. 3, p. 323.)

SECTION 1.—Be it enacted by the people of the State of Illinois, represented in General Assembly, That the Ohio and Mississippi Railway Company be, and they are hereby authorized to locate, build, construct, operate and maintain a branch railroad from some convenient point on the present railroad, between Caseyville and East St. Louis, in St. Clair county, with a single or double track to connect with any bridge or ferry now existing, or to be hereafter established between the Illinois shores of the Mississippi river and the City of St. Louis, in the State of Missouri, with power to acquire by lease, purchase or condemnation, under any law of this State, for such branch, all such rights of way, depots and other grounds as they may now be authorized by law to acquire in regard to their main track and terminus in East St. Louis, together with all the privileges, powers, rights and franchises, in regard to such branch as they now have and enjoy in regard to their present railroad: *Provided*, that this act shall not be construed to authorize the Ohio and Mississippi Railroad Company to condemn any property lying within the corporate limits of East St. Louis.

SECTION 2. This act shall take effect and be in force from and after its passage, and shall be a public act.

Approved March 30, 1869.

110-209

OFFICE SUPREME COURT U.S.
FILED
NOV 24 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

October Term, 1883.—No. 135.

FREDERICK P. DIMPFEL AND JOHN R. CALLAGHAN, APPELLANTS,

vs.

THE OHIO & MISSISSIPPI RAILWAY CO., THE FARMERS' LOAN & TRUST CO., JOHN BLOODGOOD ET AL., APPELLEES.

Appellants' Brief in reply to Brief filed in behalf of the Farmers' Loan & Trust Company.

I.

Counsel quote section 3 of the act incorporating the O. & M. Railway Co., and then say:

"This, it seems to us, confers express power to make the transaction in question, for this is an arrangement with another person or persons conducive to the convenient and effective management of its business of transportation of passengers and freight."

We submit that the ownership of the Springfield division cannot be considered as "conducive" to the more "convenient and effective management" of the business of the line of railway "*confined within* ten miles on either side of the great western mail route from St. Louis to Vincennes," and when we read this section of the act with that care which it deserves, we see that counsel, in their de-

sire to find some "authority" upon which to hang their defense, have failed to notice and to call the court's attention to the word "conducive to the objects of its incorporation" used in this section.

Applying the rules of law regarding the construction of several statutes relating to the same subject, it is very evident that this section quoted by counsel refers to the original act incorporating the railroad company, and does not increase, or in any manner alter, the powers conferred upon that company.

It has been fully shown to the court that so far as *this* company was concerned "the objects of its incorporation" were the constructing and owning of a line of railway on the route designated, and the transportation thereon of freight and passengers "by power or force of steam, or of animals, or of any mechanical or other power." This act was passed in 1851. In 1854 an amendatory act permitted the building of an extension from Illinoistown to the Mississippi river, and surely this might have been considered "conducive to the objects of its incorporation" if the building of any extension, or branch, or intersecting road, could be so considered; but, with the act of 1851 in view, the company in 1854 again came before the Legislature and asked for increased authority to enable them to own a different line of railway from that designated in the act of 1851. But let us look further: this act of 1854 is found puon page 78 of the volume containing the private laws of Illinois for that year, and on examining that volume, page 9, we find a general statute authorizing the consolidation of railroad companies. Counsel quote the second section of this act on page 8 of their printed brief, and seem to endeavor to construe that section as authorizing the importation into Illinois of the powers of an Indiana corporation. The extraterritorial effect of statutes having been fully discussed in appellant's brief, will not be again

argued, as we feel confident that the court will not sustain the views advanced in the brief to which this is a reply.

And with even more confidence, if that were possible, do appellants feel that this court will not sustain the averment made on the 9th page of the brief to which this is a reply, that appellants' "bill is defective in not averring that the consolidated company had not, by the laws of Indiana, power to purchase this line of road." Counsel seem to base their hopes in this respect upon the words—

"Shall have all the powers, franchises, and immunities which the said respective companies shall have *by virtue of their respective charters* BEFORE SUCH CONSOLIDATION PASSED WITHIN THE STATE OF ILLINOIS."

We ask the court's attention to these three lines. Appellee's counsel cannot claim that the word "PASSED" refers to any of the personal or corporate actions and forms necessary to the consummation of a consolidation, but must acknowledge, after a careful re-reading of the lines of the section they have quoted, that the word "passed" is used in its usual sense, and can only refer to and be used in connection with "their respective charters," and that this section upon which they base their hopes does not enlarge the power of any corporation WITHIN THE STATE OF ILLINOIS granted *by virtue of their respective charters* PASSED before such consolidation.

But counsel only cite the second section of this act, and seem to have forgotten that there was a first section, by which railway companies were authorized to consolidate whenever "their lines connect," provided they "have their termini fixed by law," and their roads form "continuous lines." (Session Laws, 1854, page 9.)

February 13, 1865, the Illinois Legislature passed another act regarding consolidations, (1 Gross, 538,) which provided that any consolidation attempted by any railroad company, or any board of directions with another company outside

the State, "shall be null and void," unless assented to by every stockholder resident within the State of Illinois, and the constitution of the State adopted in 1870, section 11, provides:

"In no case shall any consolidation take place except upon public notice given of at least sixty days to all stockholders in such manner as may be provided by law."

The attempt will, therefore, scarcely be made by counsel to insist that the words they have cited from second section of the act of 1854 are to be construed *without reference* to any other section of that act, or to any other acts of the Legislature passed regarding the same corporation, or any provision of the constitution enacted by the people of the State.

Again, it should not escape attention that it was at this very 1854 session of the Legislature of Illinois, which passed this consolidation law, that the O. & M. Railroad Company came and asked for permission to extend their line of railway.

Reading, then, these two statutes of 1854 together, it cannot be doubted but that at that time the railroad company considered that it had no power to own any other line of railway than that specified in their charter, and that this consolidation law did not give it such power. Counsel then proceed, on the ninth page of their printed brief, to quote the 7th section of the so-called "Tilden" act, passed by the Legislature of Indiana March 3, 1865, and assert that it furnishes the "conclusive answer" to appellants' claim; but we submit in reply to this "conclusive answer" the words of this court, previously cited, from *Clark* v. *Barnard*, (2 Supreme Court Reporter, 878:)

"The question of the powers of the Boston, Hartford and Erie Railroad Company, as a corporation *in* Rhode Island, and of the legal effect of its acts and transactions performed in that State, is to be determined *exclusively* by

the laws of that State, and not by those of Connecticut, which have no force beyond its own territory."

And the words of Chief Justice Taney, in *Ohio and Mississippi Railroad Co.* v. *Wheeler*, (1 Black, 286:)

"Neither State could confer on it a corporate existence in the other, or *add to* or diminish the powers there to be exercised. * * * It has no legal existence in either State, except by law of the State, and neither State could confer on it a corporate existence in the other, nor add to or diminish power to be there exercised."

And although it would appear that counsel are blind to the fact that it was the *extra*-state powers of this very Ohio and Mississippi Railroad Company which this court had under consideration and fully determined over twenty years ago, yet we are constrained to cite the words of this court in Muller *v.* Dowes, (94 U. S., 407:)

"The laws of Missouri have no operation in Iowa."

And to conclude in the words of this court—

"It is, however, unnecessary to discuss this subject further."

But let us notice that—

In 1869 the Legislature of Illinois passed another act authorizing a branch to be built. (Appellant's Brief, page 119.)

This was subsequent to the consolidation forming the present consolidated company, long subsequent to the acts of 1861, 1854, and 1851. We then have a series of acts extending over a period of eighteen years, which can all be read together and be rationally construed to mean just what they say. But fourteen years after this latter date, to wit, in 1883, we are informed that although no law has been passed relating to the subject under consideration, yet the previous reading of these statutes has been wrong, although the Legislature itself, by two amendments fifteen years apart,

has construed them. That construction, we submit, does not sustain the transactions in question.

II.

In their amended bill (Record, page 60.) appellants allege that it was not until October, 1876, subsequent to the filing of the bill by William King, that they became in any manner cognizant of the transactions complained of; that it was not until about the month of May, 1878, that they obtained knowledge of the transactions carried on by Torrance; that on May 26, 1878, complainant Dimpfel sent a written protest to the board of directors; that it was not until October, 1879, over a year after the filing of the original bill in this cause, that plaintiffs obtained information that Shuchardt, a director and member of the executive committee, and who, with Torrance, composed the working majority of that committee, was largely interested in the Springfield and Southeastern Railway first-mortgage bonds, and, though continuing to hold his position as director and member of the executive committee, was, as shown by the circular signed by him, (Record, pages 48–50,) personally largely interested, and was negotiating with his co-director, Torrance, in his own behalf, and for his own personal benefit.

Appellants submit that in view of the secrecy which purposely was made to enshroud the actions of Torrance, Shuchardt, and Bloodgood, the "blind" manner in which an attempted ratification was had, and all the other proceedings connected with this transaction, it is remarkable, rather than otherwise, that plaintiffs obtained the information they did within the time they did, and were enabled to file the original bill as early as September, 1878.

This court will please notice that it was not until September, 1879, that the order of the Circuit Judge was entered sustaining the demurrer to the original bill. (Record, page 32.)

For this delay plaintiffs cannot be held responsible, and it cannot affect any question of laches, and this is especially evident in view of their allegation referred to above, that it was not until October, 1879, they became aware of important features of the transactions complained of.

The cases cited by counsel do not sustain the propositions advanced by them. In the *Quicksilver Mining* case (78 N. Y., 159,) a general meeting of the stockholders, legally held, legally authorized the exchange of stock referred to. That case is not the case at bar.

Whitney Arms Co. v. *Barlow*, (63 N. Y., 62,) does not support appellee's contention. We claim that this was the view of the Circuit Judge in his order sustaining the demurrer to the amended bill, which was entered June 19th, 1880, is found in the record of this cause, page 71, and reads:

"The order of the court in this case is made without prejudice to the right of the Ohio and Mississippi Railway Company, if it shall be so advised, to institute suit in any court having jurisdiction thereof to enforce any equities claimed in its answer herein."

Why did the Circuit Judge thus specify that this order was entered without prejudice to any action by the company to enforce any "equities" it might claim? Was it for any other reason than that he considered there were "equities" in favor of the corporation and its stockholders in the transactions complained of by plaintiffs, admitted by the answer of the company, and further admitted, as to the facts stated by the demurrer of the four bondholders who had renewed their demurrer and filed it as to the amended and supplemental bill?

The answer of the railroad company (*Record*, pages 63–69) showed the Circuit Judge that there were "equities" in this case, and it appeared singular to appellants that while their bill was dismissed on demurrer admitting the statement of certain facts, his Honor, on the very same state-

ment of facts, should give the company leave to assert the same "equities" denied to plaintiffs.

The answer of the railroad company was filed the same day as the decree above quoted from. It was an answer to the appellants' amended and supplemental bill. No answer, it will be seen from the application of the railroad company, (*Record*, pages 33–34,) was filed to the original bill, and the reason was given in this application, viz., that the directors had been negotiating with John Bloodgood & Co. for an "amicable settlement of all disputes and controversies, * * * so that the Ohio and Mississippi Railway Company might be released from litigation;" but now, having failed in said negotiations, they desired to file an answer to plaintiffs' bill, and their answer was filed about two years after the original bill in this cause was filed.

No laches can be imputed on this account to the plaintiffs, and the plea that as respondent company did not immediately file its answer, owing, as it admits, to its negotiations with Bloodgood, *therefore* laches may be imputed to plaintiffs, additional to any they may be personally responsible for, must be disallowed, even though, as is claimed, the time thereby was extended to five years, and even though it had been extended for a much longer period. That stockholders who have come into court to defend their rights should be damaged by subsequent non-action before the court, or delay in such action, of directors, would be establishing a new rule in the law of corporations. Furthermore, it is observable that in this application of the railway company (*Record*, page 34) the president says:

"Said Bloodgood & Co. are conducting the defense in this case, and are the real parties in interest here present by their counsel for that purpose; that they and their friends own the majority of said bonds; that the above circumstances constitute the *real reason* why said company has not appeared in this case, and that this application for leave to appear and answer is not made for delay, but for purposes of substantial justice."

Whether any, and if any, what "negotiations" have been engaged in by the company, with John Bloodgood & Co., during the pendency of this appeal in this court, cannot appear from the record in this cause; but it seems to us perfectly proper for us to call the attention of this court to the fact that the counsel who now appear in behalf of the Farmers' Loan & Trust Co., the trustee named in Mr. and Mrs. Torrance's trust deed, bonds secured by which were handed over to Schuchardt and Bloodgood, are the same counsel that recently appeared before this court *in behalf of the company* in the case of *Warren* v. *King*, (2 Supreme Court Reporter, 787.)

No counsel now appear in behalf of the company to argue before this court the rights of all the stockholders, but company's counsel appearing on the opposite side, appellants are alone left to appear before this court to urge the enforcing of those "equities" which the Circuit Judge admitted there might be, but notwithstanding which he dismissed appellant's bill for want of equity.

III.

Counsel who filed brief for the Farmers' Loan & Trust Co. appear disturbed because plaintiffs did not state their damage in dollars and cents, and claim that the bill was properly dismissed on account of the want of such specific averment. In reply it is submitted that the averments of the bill show that plaintiffs were damaged largely, and in a certain measure irretrievably, by the transactions complained of. The issuing of $3,000,000 of bonds upon which the company might become liable; the granting voting power to those bonds; the payment of interest upon them, out of moneys which might otherwise be paid out as dividends to plaintiffs and other stockholders; the burdening of the corporation with the care of property known to have been unprofitable in the extreme, but for which

during its tenancy it would be held responsible; the throwing of the whole property into the hands of receivers upon the complaint of the nominal temporary holder of a few of the bonds issued—these and other things properly alleged in the bill and not denied by the demurrer, show damage to the plaintiffs sufficient and more than sufficient to enable them to demand and to obtain the interference of a court of equity in their behalf.

At the time this bill was drafted this court had not formulated its Rule 94, and the allegations now required by that rule were not as fully set forth in the bill as they would otherwise have been; but in the 23d paragraph (*Record*, 46–47) it is averred "that the board of directors is largely composed of, and the management of the defendant company is controlled by, persons who were, on the 30th day of January, 1875, aforesaid, either then directors of said company, or were then largely interested in the said Springfield and Illinois Southeastern Railway."

This allegation is not denied by the demurrer, and being evasively answered in the answer of the railway company, is admitted to all intents and purposes. If the demurrants had proposed to dispute plaintiffs' right to bring their bill or to allege damage, they should not have filed their demurrer, but have answered the bill and had the case referred to a master. It is now too late to bring up the question of the technical form of some of the allegations of the bill, which, if a reference had been had, would have been shown to have been in accordance with verity.

IV.

Counsel, in their brief filed for the Farmers' Loan and Trust Co., appear to claim that the transactions between Torrance and Schuchardt on the one hand and Schuchardt and Bloodgood on the other, was a "common case," and that they "know of no rule of law which forbids a di-

rector dealing with his company if he puts himself into a position where he is dealing at arm's length with it."

This court cannot but see that in the case at bar Schuchardt did not put himself into such "*a position.*" He was in New York, and, with Torrance, was the effective working power of the company. He was in New York, and was practically and necessarily looking after his own interests, as is shown by the circulars signed by him, (*Record*, pages 48–50.) He was not "at arm's length" from the company, so far as practical power was concerned, as he with Torrance composed the majority of the executive committee, but he did, most noticeably, "put himself into a position where he was dealing at arm's length" with the stockholders of the respondent railway company, and with everybody else so far as the interests of those stockholders were concerned. To be sure he may possibly have entertained a hope that the Springfield road might become profitable. Counsel seem to refer to such a hope in the minds of Schuchardt and Torrance when they refer to the Springfield road, and say that "it was hoped [it] would prove a valuable feeder to the main line of the Ohio and Mississippi Railway Company." Counsel do not tell us how much these hopes were influenced by Schuchardt's being a Springfield bondholder, and of which he had said "*the only course* left to us" (*i. e.*, Schuchardt and Bloodgood) "to *save* the bondholders" (*i. e.*, Schuchardt and Bloodgood) "from TOTAL LOSS was to endeavor to lease or sell the property," which thereupon he attempted to do.

In *O. & M. R. R. Co.* v. *Dunbar*, (20 Illinois, 624,) decided in 1858, the Supreme Court of Illinois say regarding this very corporation respondent in this case, "*It will not do* to say that it is more convenient or *more profitable* to act in a particular manner."

Again we find that the cases cited by counsel do not sustain their contention. In Olcott *v.* Tioga Railroad Co., (27 N. Y., 546,) the president of the company was carry-

ing on its usual business. In the case at bar it cannot be claimed that the obtaining 222 miles of railroad partly built and always unprofitable; the signing of a mortgage as president, which he also signed as an individual, in which latter part of the transaction he was joined by his wife; the signing $3,000,000 of bonds and handing over $1,995,000 of them to a co-director and another interested with that co-director,—it cannot be claimed that these actions are the usual and ordinary actions of the president of a railroad company. There is scarcely a page of the *Record* in this case which does not bear testimony that to the minds of Torrance, Schuchardt, and Bloodgood it was evident that this was not a usual and ordinary transaction, in which a railroad president might engage, but that it was an unusual and extraordinary one, which could not be carried out to its consummation without the utmost secrecy. The various deeds of January 28th, 29th, and 30th were not acknowledged until February 18th and 23rd. Schuchardt's circular, from which we have quoted his words regarding a "total loss," is dated from his office, "22 William street, New York, March 3rd, 1875." (*Record*, page 50.) On the 13th day of March, 1875, the answer of the respondent company alleges Torrance made known the terms of his "contract, * * * and that the same had been carried out and said conveyances recorded; that the bonds which were to be given in payment had been *executed and delivered*." This, we submit, cannot be construed as a case where a director "*puts himself* into a position where he is dealing at arm's length with" his company. Counsel are particularly unfortunate in their references to Kent *v.* Quicksilver Mining Co., (78 N. Y., 159.) Their second citation of this case is on page 17 of their brief, and we beg leave to repeat here the words quoted by them:

"An unconscionable arrangement will not be disturbed where there has been ratification of it, with knowledge

of all its bearings, after time has been had for consideration."

What are the facts in the case at bar?

An "UNCONSCIONABLE ARRANGEMENT" is fully shown.

"Ratification, with knowledge of all its bearings, after time has been had for consideration," is not only not shown, but a contrary state of facts is fully set forth.

It is desired particularly to call the attention of this court to the fact that the decision of Judge Drummond, as reported in 9 Bissell, 127, was rendered before plaintiffs' amended and supplemental bills were filed. Counsel are in error regarding this in their statement on page 18 of their brief.

The statement of errors in appellants' brief, heretofore filed, covers the points upon which Judge Drummond decided against the plaintiffs, and appellants have appealed with confidence to this court, having in view the fact that in its long line of decisions in railway cases it has not deemed it necessary either that "great liberality should be exercised" as against the rights of individual stockholders, nor has it sanctioned the actions of a president or of directors in secretly, or long prior to obtaining any approval, endeavoring to assume authority they did not possess, and change the character of the corporation in detriment of the rights of the stockholders.

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WASHINGTON, *November* 20, 1883.